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Supreme Court of the United States

October Term, 1966

No. 605

SKOURAS THEATRES CORPORATION, THEATRE & CINEMA, INC., PHILHAMBRO, INC., YOUNGSTOWN THEATRE CORPORATION and MODERN PLAYHOUSES, INC.,

Petitioners,

v.

NICK C. SPANOS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners,

v.

NICK C. SPANOS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Skouras Theatres Corporation, Theatre & Cinema, Inc., Philhambro, Inc., Youngstown Theatre Corporation and Modern Playhouses, Inc., pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on August 2, 1966.

Opinions Below

The opinion of the United States District Court for the Southern District of New York, printed in the record at R. 212a to 244a,* is reported at 235 F. Supp. 1 (1964).

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* Record references herein designated "R. —a" are to pages in Volume I of the certified record (Appendix to Appellant's Brief); "R. A.—", to pages in Volume II of the certified record (Appellee's Appendix and Proceedings in the Court of Appeals).

The opinions of the panel of three judges of the Court of Appeals which first heard the appeal, printed in Appendix B, *infra,* p. 9a, have not yet been reported. The opinions of the Court of Appeals on reconsideration *in banc,* printed in Appendix B, *infra,* p. 22a, have not yet been reported.

Jurisdiction

The judgment of the Court of Appeals was entered on August 2, 1966 (Appendix C, *infra,* p. 33a). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

In 1953, a California lawyer agreed to render legal services in New York for petitioners and other companies affiliated with them, in connection with an action under the federal antitrust laws (then in preparation and shortly thereafter commenced in the United States District Court for the Southern District of New York) and other matters, on the understanding that his status in the case was to be equal with that of every other lawyer retained by petitioners in the case and that he was to move his principal place of business and residence from California to New York no later than January, 1954. For more than five years thereafter, until his discharge in 1958, the lawyer performed such services in New York, both in connection with the District Court action and the other matters; received substantial fees for his services; occupied offices in New York; frequently consulted with clients there; was physically present there for substantial periods of time; and, for some four years, actually resided in New York, most of that time with wife and children. The lawyer maintained his residence in New York until August, 1959, when he and his family moved to Kansas City, Missouri (but with the intention to make his home not in Missouri

but rather in California). At no time did the lawyer seek or obtain admission to the New York bar or to practice, generally or *pro hac vice*, in the District Court.

The questions presented are:

1. Under such circumstances, is the California lawyer barred from recovering any additional compensation for legal services he rendered in New York in connection with the District Court action, because, having failed first to obtain admission to the New York bar or to practice before the District Court, he was engaged in the illegal practice of law? This question involves consideration of the following subsidiary questions:

   a. Did the California lawyer engage in the unauthorized practice of law in violation of sections 270 and 271 of the New York Penal Law?

   b. Was application of those state provisions preempted by federal law or rule?

   c. Did the lawyer, by failing to obtain admission to practice in the District Court, violate federal law?

   d. If there was a violation of the applicable New York law or federal law, is the lawyer's failure to seek and obtain admission to practice in the District Court excusable as a mere technicality and is the defense of illegality unavailable to the clients?

2. If state provisions barred the California lawyer from such recovery, would they be invalid under the privileges and immunities clause of the Constitution?

3. Did the District Court lack jurisdiction of this action because of failure of proof of diverse citizenship?

Constitutional Provisions, Statutes and Rules Involved

The constitutional provisions involved are Article VI and the Fourteenth Amendment. The statutes involved are 28 U. S. C. 1654 (1964) and sections 270 and 271 of the Penal Law of the State of New York. The rules involved are Rules 3(a) to 3(c), 4 and 5 of the General Rules of the United States District Court for the Southern District of New York. These statutes and rules are printed as Appendix A, *infra,* p. 1a.

Statement

This is an action by respondents commenced by a complaint filed, in October 1959, in the United States District Court for the Southern District of New York ("the District Court"), to recover additional compensation for legal services he rendered in New York, from 1953 to 1958, in connection with a suit under the federal antitrust laws (in preparation when respondent was retained and commenced shortly thereafter, likewise in the District Court) ("the industry suit") (R. 3a-7a). The jurisdiction of the District Court was invoked because of alleged diversity of citizenship, respondent alleging that he was a citizen of California and petitioners citizens of New York (R. 3a).

Shortly after the District Court decision in the *Paramount* case (*United States* v. *Paramount Pictures,* 66 F. Supp. 323 (1946), 70 F. Supp. 53 (1947), modified and affirmed 334 U. S. 131 (1948)), petitioners, independent operators of motion picture theatres in the New York area, retained three separate firms of New York lawyers, experienced in antitrust litigation, to examine into and prosecute claims under the antitrust laws: Messrs. Weisman, Celler, Allan, Spett & Sheinberg ("the Weisman firm"), Messrs. Medina and Sherpick ("the Sherpick

firm") and the firm of Mr. James M. Landis (R. 13a, 95a-97a, 98a, 115a). For some five years, those three firms were engaged in formulating petitioners' grievances, making demands on their behalf against prospective defendants, effecting a settlement with one of the prospective defendants, and drafting a complaint for filing in the District Court (R. 13a, 97a-99a, 115a-119a, 125a-127a, 140a-143a).

Late in 1952, George P. Skouras ("Skouras"), a director of one of the petitioner companies, having learned of respondent's activities in the motion picture antitrust field and believing that his services might prove useful, suggested that Mr. Landis arrange to associate respondent with him in the representation of petitioners and their affiliates (D. Ct. Op. R. 217a-218a, R. 23a-29a, 72a-73a, 92a-93a). Thereafter, in early 1953, respondent and Landis entered into an agreement (R. 164a-166a), providing that respondent would "become associated with . . . [Landis] in the representation of Skouras Theatres Corporation and/or United Artists Theatre Circuit, Inc., or either, or both of them, as to certain litigation and other matters"; that respondent would move his "principal place of business and . . . residence to New York City" by January 4, 1954, and that Landis would provide respondent with "suitable office space and stenographic service in New York City."

Contemporaneously, a letter was sent by petitioners to respondent and approved by him, referring to his agreement with Landis whereby he would become associated with Landis "in the representation of Skouras Theatres Corporation, United Artists Theatre Circuit, Inc. and any of its affiliates" and Landis would pay respondent an annual compensation of $15,000 "to be applied against or in addition to a certain percentage . . . not worked out as yet" of the "total fee Mr. Landis received" from the industry suit, and providing that payment of the $15,000 an-

nual compensation "will be guaranteed to you by our companies" (R. 161a-163a). This letter also obligated respondent to move to New York by January 4, 1954 (*Ibid.*).

In March, 1956, the Landis and Sherpick firms formally withdrew as attorneys for petitioners in the industry suit (R. 15a, 49a-51a, 76a-78a, 181a-182a), and petitioners entered into a written retainer agreement with the Weisman firm (R. 176a-179a). Landis' withdrawal in 1956 made the 1953 arrangement between him and respondent obsolete, and petitioners thereupon agreed to pay respondent a contingent fee, undefined as to amount, if he would continue to render services in the industry suit (D. Ct. Op. R. 224a-225a).

In October, 1958, petitioners discharged respondent as attorney (R. 54a, 66a, 195a-197a).

During the more than five-year period involved, from early 1953 to October, 1958, respondent performed legal services in New York, for petitioners and for others and in connection with the industry suit and other matters. During this period, he occupied offices in New York, resided there with his family, frequently met and conferred with clients there, and was physically present there for substantial periods of time (R. 29a, 30a, 35a-49a *passim*, 56a-58a, 64a-65a, 66a-67a, 69a, 147a-148a, D. Ct. Op. 236a-241a *passim*).

In performing the services in the industry suit, respondent worked independently, participated in conferences with petitioners' other lawyers in the industry suit, participated in their conferences with lawyers representing defendants in the suit, and met and advised with Skouras, both alone as well as together with petitioners' other lawyers. Respondent at no time made a court appearance or acted in any respect whatever as attorney of record for petitioners

(D. Ct. Op. R. 230a). From 1953 to October, 1958, when he was discharged by petitioners, they paid respondent sums aggregating $84,250 for the services rendered by him in connection with the industry suit alone (*Id.* R. 243a).

Respondent's legal services rendered in New York in matters other than in connection with the industry suit included work on the preparation of a uniform distribution agreement and a financing agreement for a company affiliated with petitioners but not a party to the industry suit; work on various corporate affairs of another company affiliated with petitioners, likewise not a party to the industry suit; consultation and advice as to theatre leases being negotiated for certain of petitioners; and work on various matters for still another petitioner-affiliated company not involved in the industry suit, including representation in a commercial dispute, preparation of standard forms of contract and trademark matters (R. 64a-65a, 186a-189a, D. Ct. Op. R. 226a). Respondent made it clear that he expected compensation, as an attorney, for these legal services quite apart from and in addition to that which he received for the industry suit services, and he did, in fact, receive such additional compensation (R. 186a-189a).

The present action was filed by respondent in the District Court on October 13, 1959. On October 30, 1964, after a trial without a jury, the District Court rendered judgment for respondent in the amount of $89,606.29 (R. 244a). Rejecting respondent's claim for a fixed fee because no definite contingency had been stipulated, the Court nevertheless held that he was entitled to recover in *quantum meruit* and that the value of his legal services rendered in the industry suit was $150,000 (which, less the sum of $84,250 previously paid to him, left a balance owing of $65,750, with interest from the date of his dis-

charge in 1958 of $23,856.29, in all the sum of $89,606.29 (R. 242a-243a).

With respect to petitioners' defense that respondent's non-admission to the New York bar precluded his recovery of compensation for legal services, the District Court held that respondent had not violated the New York statutory provisions relating to the unauthorized practice of the law and that even if he had "New York could [not] penalize . . . [him] by denying him recovery for the services rendered" in connection with a federal court action (R. 233a-234a). Adverting to General Rule 3(c) of the Rules of the District Court, the Court stated that if respondent had been admitted under that rule, his right to recover could not be defeated because of practice of law in violation of New York law; treated respondent's failure to apply for or obtain such admission *pro hac vice* as a mere technicality, not impairing his right of recovery; and held that it was of no moment that respondent was otherwise illegally practicing law in New York (R. 234a).

On appeal to the Court of Appeals, a panel of three judges of that Court, on March 18, 1966, reversed the judgment of the District Court and dismissed the complaint, Judge Friendly dissenting (Appendix B, *infra*, p. 9a). The panel held that, in view of the intervening decision of the New York Court of Appeals in *Spivak* v. *Sachs*, 16 N. Y. 2d 163, 211 N. E. 2d 329 (1965), respondent's "activities over a six-year time span, even though related to a single case, must now be considered practicing law" in violation of New York law, and that although respondent could have applied for leave to appear in the industry suit in the District Court under Rule 3(c) and, on securing such leave, become entitled to reasonable compensation despite the contrary policy in New York, respondent's failure to secure admission *pro hac vice* barred him from recovery (*Id.*, pp. 15a-20a).

On petition by respondent, the Court of Appeals granted a rehearing *in banc* and invited additional briefs from the parties and from bar associations as *amici* on the defense of illegality (R. A312). On August 2, 1966, the Court handed down its decision affirming the judgment of the District Court in favor of respondent, Chief Judge Lumbard and Judge Smith dissenting (Appendix B, *infra*, p. 22a). The *in banc* Court held, first, that the District Court was correct "in concluding that a right to recover could be predicated on Rule 3(c) of the District Court", treating respondent as though he had been admitted *pro hac vice* and construing such *pro hac vice* admission as according "official recognition to his status as an attorney in the District Court for all purposes of the action . . . [insulating] him from § 270 of the New York Penal Law with respect to any legal services reasonably incident to the activities the District Court had authorized" (*Id.*, pp. 24a-25a). As an alternative ground for affirmance, the *in banc* Court held that "under the privileges and immunities clause of the Constitution, no state can prohibit a citizen with a federal claim or defense from engaging an out-of-state lawyer to collaborate with an in-state lawyer and give legal advice concerning it within the state" and that section 270 of the New York Penal Law could not constitutionally be held to bar recovery of compensation by an out-of-state lawyer for legal services rendered to a New York client in New York where such services are rendered "in association with a local lawyer on a federal claim or defense" (*Id.*, pp. 26a-29a). Judge Hays, specially concurring in the result, stated that if "Section 270 of the New York Penal Law is correctly construed to prevent . . . [respondent's] giving advice in New York on federal law, whether with or without the collaboration of a New York lawyer, then the Section is invalid under the privileges and immunities clause of the Constitution" (*Id.*, pp. 29a-30a).

Reasons for Granting the Writ

The decision below involves important questions, arising under the Constitution and laws of the United States which relate to the respective powers of the States and the federal government to regulate the practice of law. These questions appear never to have been considered by this Court. Their extraordinary importance is manifest from the fact that the Court of Appeals deemed it appropriate to reconsider the appeal of the case *in banc* and, on such reconsideration, to invite and receive additional briefs not only from the parties but also from bar associations as *amici* (R. A312). In its subsequent *in banc* opinion, the Court explicitly adverts to "the importance of the problem and the desirability of furnishing guidance to the bar" (Appendix B, *infra*, p. 25a). Certiorari should be granted so that this Court may settle these questions. Moreover, the fact that the questions directly affect the conduct of proceedings in the federal courts, over which this Court exercises supervisory power, is further reason for review by this Court.

1. There is, first, the question of whether and to what extent federal law preempts the application of state laws relating to the unauthorized practice of law. The Court below holds that had respondent been granted permission, under the local General Rule 3(c) of the District Court, "to argue or try a particular cause in whole or in part as counsel or advocate" (Appendix A, *infra*, p. 5a), that "would have given official recognition to his status as an attorney in the district for all purposes of the action and would have insulated him from § 270 of the New York Penal Law [prohibiting the unauthorized practice of law] with respect to any legal services reasonably incident to the activities the District Court had authorized" (Appendix B, *infra*, pp. 24a-25a); and treats respondent as having been granted such leave notwithstanding his failure to seek or

obtain such *pro hac vice* admission under Rule 3(c). In effect, the Court holds that state laws prohibiting the unauthorized practice of law by out-of-state attorneys are displaced by federal law and rule, at least with respect to services incident to federal litigation, notwithstanding the fact that such out-of-state attorneys are engaged for many years in the State in legal practice in clear violation of the state laws and despite the failure of such attorneys to seek and secure admission to the federal courts.

There appears to be no justification for so radical an invasion by the federal courts into a field, the regulation of the practice of law, long considered reserved to the States. Even though the pertinent federal law may be read to authorize some measure of preemption, there is no authority for so drastic a displacement of state law and regulation.

In view of the recent decision in *Spivak* v. *Sachs*, 16 N. Y. 2d 163, 211 N. E. 2d 329 (1965), announced after the District Court decision in this case, there can no longer be any doubt that respondent's activities here violated the New York law and that under that law he would be barred from the recovery granted to him below. Section 270 of the New York Penal Law (Appendix A, *infra*, p. 1a) makes it unlawful for any person, without first having been admitted to practice in New York, to practice or appear in any state court, to furnish attorneys or counsel to render legal services, to hold himself out to the public as being entitled to practice law in any manner, or to assume to be an attorney. Section 271 (Appendix A, *infra*, p. 2a) expressly prohibits the receipt of compensation by any person with respect to the performance of specified legal services. The New York courts have given these sections an extremely broad and liberal interpretation to ensure that the state organs for regulating and disciplining attorneys remain available to protect its residents against any persons engaging in activities which bring into play the fiduciary attorney-client relationship and call for the special expertise derived only from legal training.

The legal services which respondent performed are clearly within the proscription of the New York statutes. As in *Spivak*, respondent's services consisted of "advice and assistance rendered to . . . [the client and his] attorneys . . ." (16 N. Y. 2d at 165). In contrast to the "single isolated incident" of legal services in *Spivak*, restricted to a period of fourteen days in connection with a single matter (*Id.* at 167), respondent performed substantial legal services over a period of some five years. As in *Spivak*, it is no answer to point "to rules permitting out-of-state lawyers to appear in our Courts on occasion or even be admitted to practice here," because the "first is by express permission of the Court and always on recommendation by a member of our Bar" and the latter "only after the fulfillment of certain express requirements" (*Id.* at 168), neither of which conditions was met by respondent, who never sought or obtained admission to the New York bar or to practice before the District Court.

The New York cases further make it clear that the practice of law prohibited includes legal services relating not only to New York law but also to issues governed by foreign or federal law and services even when performed before a federal court or administrative agency. *Matter of New York County Lawyers Association* (*Roel*), 3 N. Y. 2d 224 (1957); *People* v. *Alfani*, 227 N. Y. 334 (1919); *Matter of New York County Lawyers Association* (*Bercu*), 273 App. Div. 524, 78 N. Y. S. 2d 209 (1st Dept. 1948), aff'd. 299 N. Y. 728 (1949).

The New York law in this respect is not unique. The Pennsylvania courts have reached the same conclusion under similar statutory provisions. *Ginsburg* v. *Kovrak*, 392 Pa. 143, 139 A. 2d 889 (1958), appeal dismissed for want of a substantial federal question *sub. nom. Kovrak* v. *Ginsburg*, 358 U. S. 52 (1958) (enjoining a lawyer admitted to practice in a federal district court "from practicing law" in the county in which he maintained an office).

Sperry v. *Florida*, 373 U. S. 379 (1963), also expressly recognized that state statutes regulating the practice of law have generally been held to extend to practice in federal matters and that, absent an express Congressional intent to preempt the regulation of a particular kind of practice and thus supersede state laws, there is no federal statutory or constitutional objection to their broad scope (373 U. S. at 383).*

Whether or not the Congress has the power to supplant such provisions of state law insofar as they apply to practice in connection with federal litigation, it certainly has not done so. Congress has nowhere manifested that clear intention to preempt which is necessary before a federal statute will be read to supersede the exercise of power by the States. *Schwartz* v. *Texas*, 344 U. S. 199, 202 (1952). The only pertinent federal statute is 28 U. S. C. 1654 (Appendix A, *infra*, p. 1a), stemming from section 35 of the First Judiciary Act, Act of September 24, 1789, c. 20, 1 Stat. 73, 92, which simply states, in general terms, that

> "[i]n all courts of the United States the parties may plead and conduct their own cases personally or by counsel, as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."

The statute on its face certainly manifests no intention to preclude the application of applicable state laws, nor are we aware of any legislative history which suggests any such intention. The First Judiciary Act of 1789 was, of

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* Indeed, prior to its decision in the present case, the Court below also had held companion New York statutory provisions with respect to the practice of law applicable in the federal courts sitting in that State (*VanBergh* v. *Simons*, 286 F. 2d 325 (2nd Cir. 1961); and the District Court for the Southern District of New York had made it clear that provisions of the New York Penal Law governing the practice of law in that State are applicable to services rendered in the federal courts (*Piorkowski* v. *Arabian American Oil Company*, 131 F. Supp. 553 (S. D. N. Y. 1955)).

course, "a compromise measure so framed as to secure the votes of those who, while willing to see the experiment of a Federal Constitution tried, were insistent that the Federal Courts should be given the *minimum* powers and jurisdiction . . . ". Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. R. 49, 53 (1923) (emphasis supplied). Indeed, original federal question jurisdiction remained with the state courts for almost a century, and it "was not until 1875 that the lower [federal] courts were given general original jurisdiction in language virtually the same as that of the Constitution of federal question cases. Act of March 3, 1875, § 1, 18 Stat. 470." The American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts*, Tentative Draft No. 4, pp. 37-38 (1966).

Moreover, it is notable that section 35 of the First Judiciary Act followed immediately on the rules of decision section, section 34, which made applicable in the federal courts "the several laws of the several states". And the reference in section 35 to "counsel or attorneys at law" (later modified to read "counsel") seems to contemplate that the rules of admission which Congress authorized the federal courts to promulgate limit admission to persons who were already qualified as "counsel or attorneys at law" by membership in the various state bars.

This Court appears to have so construed the Congressional mandate, for its Rule 5 requires, as condition for admission to the bar of this Court, that the attorneys shall first have been admitted to practice "in the highest court of a State, Territory, District, Commonwealth or Possession", imposing only an additional character qualification. It is significant also that at no time in the 177 years since our federal courts were established has any system for the establishment of a federal bar, with rules for examination and admission of attorneys independent of state rules, been adopted. As recently noted, "surely state law is still

the source of basic regulation of the legal profession, whether an attorney is pressing a federal or a state claim within its borders." *N. A. A. C. P.* v. *Button*, 371 U. S. 415, 463 (1963) (Harlan, J., dissenting).

In light of these considerations, the broad construction which the Court below gives to General Rule 3 of the District Court, adopted pursuant to the general statutory grant of power embodied in 28 U. S. C. 1654, seems wholly unjustified.

On its face, Rule 3 (Appendix A, *infra*, p. 3a) deals only with admission "to practice in this court" and does not even purport to relate to general admission to practice within any specified geographic area. Rules 3(a) and 3(b) govern general admission: Rule 3(a) provides that, upon meeting certain requirements, a member of the New York bar or the federal District Court and state bar in New Jersey, Connecticut or Vermont "may be admitted to practice in this court . . .", and Rule 3(b) simply provides for admission "to the bar of this court" predicated upon admission to the District Court for the Eastern District of New York.

Since respondent, a California lawyer, was admittedly ineligible for general admission, it is only Rule 3(c) which is involved here. That Rule, limited to *pro hac vice* admission, provides that a member in good standing of the bar of any State or of any federal District Court may, upon motion, be permitted "to argue or try a particular case in whole or in part . . ." (Appendix A, *infra*, p. 5a).

The Court below reads this limited Rule 3(c) as having preempted the application of the New York law. Thus, an attorney not admitted to the New York bar but who maintains offices here and holds himself out as a lawyer, merely by obtaining *pro hac vice* admission as to each case he brings in the federal court, would be enabled to carry on

the practice of law in New York without satisfying the requirements for admission to the New York bar or to the bar of any of the other States specified in General Rule 3(a), or indeed any of the other requirements for admission provided in Rule 3(a). Such a result would, of course, create the most flagrant danger from the unauthorized practice of law.

Certainly, this Court's decision in *Sperry* v. *Florida*, 373 U. S. 379 (1963), relied on below, neither compels nor sanctions so extraordinary an enlargement of the federal power. It is true that this Court there held application of the Florida statutes prohibiting the unauthorized practice of law by a layman licensed by the United States Patent Office for practice before that agency preempted by the provisions of federal statutes and regulations governing practice before the Patent Office, but it did so only because the governing federal statutes and regulations made it crystal clear that Congress intended that laymen be permitted to practice before the Patent Office. This Court pointed out that this Congressional decision had been reached after extensive discussion and controversy in which various groups, including bar associations, had urged that such practice by laymen should be prohibited because it required probity and general legal training which could be assured only by the states' regulatory requirements with respect to the admission and discipline of attorneys. The Court noted that Congress expressly rejected this view and determined that the need for trained technical personnel in Patent Office practice outweighed whatever danger might result from laymen-representation and that any danger would be minimized by the Patent Office's extensive regulation of such practice, including the requirement for a difficult examination. As indicated, however, no such legislative history marks 28 U. S. C. 1654.

Nor does General Rule 3 of the District Court suggest any intent to supersede the provisions of state law; on the

contrary, it proceeds on the assumption that the principal responsibility for regulating admission to practice will remain with the States. And this assumption also underlies Rule 5 (Appendix A, *infra*, p. 6a), which deals with the disciplining of attorneys admitted to practice before the District Court, providing that such matters be referred to the "bar association in the county where the member has his office."

There is therefore no reason to read Rule 3(c), as the Court below has read it, to supersede the New York law with respect to practice in that State.*

Especially in this case are review and reversal of the decision below required. For, although we have heretofore assumed the applicability of Rule 3(c), the fact remains

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* It is interesting to note that, in bold contrast to the present case, the Court below, in another recent decision, underscored the essentiality of accommodating federal and state regulations in fields traditionally subject to state control and regulation. *Swift & Company, Inc., et al.* v. *Wickman*, — F. 2d — (July 12, 1966, printed in 156 N. Y. L. J. No. 50 (9/12/66), p. 1). There, the Court affirmed a three-judge court decision, substantially on the basis of the opinion of Judge Friendly, sitting as a member of that three-judge court, and refused to set aside a New York statute and regulation requiring weight labelling of poultry on the asserted ground that they were in conflict with the federal Poultry Products Inspection Act. The Court noted this Court's "caution that '[F]ederal regulation of a field of commerce should not be deemed pre-emptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion or that Congress has unmistakably so ordained' (Florida Avocado Growers v. Paul, 373 U. S. 132, 142 [1963])" and that "uniform and accurate weights and measures is a traditional subject of state regulation"; and it held that the complaining poultry packers had failed to discharge the burden of establishing an "irreconcilable conflict" between the federal law and the state regulatory system because they had failed to exhaust federal agency administrative procedures in which the State's interests "could be presented and perhaps satisfied", thus effecting the reconciliation between the federal and state systems of regulation.

that respondent here did not even apply for or obtain admission under that Rule. As the dissenting judges below stated (Appendix B, *infra*, p. 19a):

> ". . . We cannot presume that application would be a formality in every case because there may be circumstances which might well lead a court to deny admission, a matter which many cases declare to be within 'the sound judicial discretion of the trial court.' *Atchison, Topeka and Santa Fe Ry. Co.* v. *Jackson*, 235 F. 2d 390 (10 Cir. 1956). And we can hardly believe that the admission of lawyers to participate in protracted litigation is a matter to be treated lightly, especially in view of New York's evident concern to uphold the standards of practice in the state. Therefore it would be inadvisable to lay down a rule which, in many instances, would require other federal or state courts to speculate whether a particular district court would or would not have admitted a particular attorney. Considering that the primary responsibility for the regulation of those who may practice law lies with the state and that an exception from such regulation for persons conducting federal litigation exists only because of the federal statute and rules of the district courts, we feel compelled to limit recovery for services to attorneys who have fully complied with the rules creating the exception of which they seek to take advantage."

Respondent's failure to comply with the rules of the District Court cannot be excused, as the Court below suggests, because the agreement he made with petitioners was, at the time it was made, "susceptible of being lawfully performed" and thus not an illegal bargain (Appendix B, *infra*, p. 25a). The fact is that, having failed first to secure admission to the New York bar or to practice before the District Court, respondent performed the services illegally; and it is for such illegally performed services that he here sues. Nor is it true, as the Court below implies, that petitioners frustrated respondent's ability to perform his contract in a lawful manner. Even if petitioners im-

pliedly assumed an obligation to have their New York lawyers "make any motion that was necessary to render . . . [respondent's] appearances lawful" (Appendix B, *infra*, p. 24a), which we question, the record is clear that respondent never asked that any such motion be made and that petitioners' New York lawyers never refused to make any such motion. Certainly, when respondent agreed to perform legal services in New York and to move his residence and principal place of business there, it was he who assumed the obligation to take all steps necessary to regularize his status and to legitimize his services; if breach of condition there was, it was respondent's breach. Moreover, petitioner's discharge of respondent in 1958 can hardly be said to have cut "off his opportunity to validate his status" during the more than five years that he was in New York before he was discharged (Appendix B, *infra*, p. 25a).

Review by this Court is also necessary to consider the question, which the Court below seems to have ignored, whether, because respondent failed to secure admission to practice before the District Court, his services constituted the unauthorized practice of law not only under the laws of New York but also as a matter of federal law.

Certainly, as here, where respondent could not qualify for general admission to practice before the District Court, he should have been compelled, before rendering legal services, at the very least to move for admission *pro hac vice* and, on such motion, to disclose to the Court the nature and extent of the contemplated services. Thus, the Court would have been in a position, before legal services were rendered, intelligently to determine whether the interests of justice would be served by permitting an otherwise unqualified attorney to assume such broad responsibility on a *pro hac vice* basis. The Court below erred in assuming that had respondent sought *pro hac vice* admission, it would inevitably have been granted him. Had respondent disclosed the nature of his relationship with petitioners and

the substantial services he had undertaken to perform in New York, the District Court clearly would not have granted him permission *pro hac vice* but would indubitably have required him to apply for general admission to practice before the Court. An attorney who agrees to move his residence and principal place of business to New York, who occupies offices there, who resides there with family for several years, who there performs legal services in matters other than federal litigation, and who accepts payment of some $85,000 as compensation for legal services performed in that State is plainly not an attorney for which *pro hac vice* admission is designed.

Thus, by performing the services here involved without obtaining general admission or admission *pro hac vice* to practice before the District Court, respondent violated the rules of the District Court and was engaged in unauthorized practice in violation also of federal law.

2. The decision below also represents an unprecedented enlargement of the scope of the privileges and immunities clause of the Fourteenth Amendment and involves the extremely important question, never considered by this Court, as to the reach of that clause in restraint of state regulation of the practice of law, an area historically subject to such regulation.

The Court below holds that the right to bring an action under the federal antitrust laws in the federal courts is a privilege of citizens of the United States within the privileges and immunities clause of the Fourteenth Amendment, that the constitutional guarantee against its abridgement must be read to "comprehend the right to bring to the assistance of an attorney admitted in the resident state a lawyer licensed by 'public act' of any other state who is thought well fitted for the task, and to allow him to serve in whatever manner is most effective, subject only to valid rules of Courts as to practice before them", and that con-

sequently "no state can prohibit a citizen with a federal claim or defense from engaging an out-of-state lawyer to collaborate with an in-state lawyer and give legal advice concerning it within the state" (Appendix B, *infra*, pp. 26a, 27a). Thus, if section 270 of the New York Penal Law were held to bar such legal services by an out-of-state attorney or to deny him compensation therefor, it would, says the Court, be unconstitutional.

Since the Court professes alertness to the perils involved in any extension of the privileges and immunities clause, noting the admonition by Mr. Justice Frankfurter that the clause "could lend itself to 'mischievous uses' if its scope were not confined to those interests 'growing out of the relationship between the citizen and the national government, created by the Constitution and federal laws', *Adamson* v. *California*, 332 U. S. 46, 61 (1947) (Frankfurter, J., concurring)" and the "judicial reluctance to expand the content of national citizenship . . . due to a fear of creating constitutional refuges for a host of rights historically subject to regulation." *Bell* v. *Maryland*, 378 U. S. 226, 250 (1964) (opinion of Douglas, J.) (Appendix B, *infra*, pp. 26a-27a), it is difficult to understand its readiness, in the circumstances of this case, to indulge in so radical an enlargement of the clause.

The privileges and immunities clause "has consistently been construed as protecting only that limited class of interests growing out of the relationship between the citizen and the national government created by the Constitution and federal laws" (*Hague* v. *C. I. O.*, 307 U. S. 496, 520, n. 1 (1939) (opinion of Stone, J.); *Colgate* v. *Harvey*, 296 U. S. 404, 444 (1935) (Stone, J., dissenting); *In re Kemmler*, 136 U. S. 436, 448 (1890); *Madden* v. *Kentucky*, 309 U. S. 83, 92, n. 21 (1940), and this Court has almost uniformly rejected appeals to extend the clause beyond those limitations. The refusal to broaden application of the clause has been deliberate: it has been feared that if it

were employed profligately to restrain the States in areas traditionally reserved to state regulation, "it would enlarge judicial control of state action and multiply restrictions upon it to an extent difficult to define, but sufficient to cause serious apprehension for the rightful independence of local government" (*Colgate* v. *Harvey*, 296 U. S. 404, 445 (1935) (Stone, J., dissenting); *Hague* v. *C. I. O.*, 307 U. S. 496, 521, n. 1 (1939 (opinion of Stone, J.)).

In view of these limitations on the privileges and immunities clause, its extension by the Court below to a field historically subject to state regulation raises serious questions. Assuming *arguendo* that the right to assert federal claims and defenses is a privilege of citizenship guaranteed against state encroachment by the Fourteenth Amendment (a most doubtful proposition, since the assertion of federal claims and defenses is not restricted to citizens and until 1875 was not even a matter within the original jurisdiction of the federal courts (*supra*, p. 14)), it is most questionable that the privilege of the litigant to call on a particular person whom he considers "best fitted for the task" for assistance in the prosecution of such a claim or defense rises to that high status. Even the Court below appears unwilling to extend constitutional protection to that privilege to all cases: it first limits the privilege to employment of a person licensed to practice law by one of the fifty States; and it then further requires that such an out-of-state attorney render his services in association and collaboration with a duly licensed in-state attorney (Appendix B, *infra*, p. 29a).* (The Court apparently ignores the findings of record here that respondent performed services directly with the clients and independent of the in-state attorneys (D. Ct. Op. R. 221a; Appendix B, *infra*, p. 26a), and that thus this case itself does not satisfy the limitations imposed.)

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* But apparently the Court would consider the Fourteenth Amendment protection applicable to the right to employ such a limited class—attorneys associated with in-state counsel—in a *state* court as well as in a federal court, so long as assertion of a federal claim or defense is involved.

It may be that where the unpopularity of the asserted federal claim makes local counsel unavailable and resort to out-of-state counsel imperative, constitutional due process precludes a federal court rule requiring participation of local counsel. *Cf. Lefton* v. *City of Hattiesburg*, 333 F. 2d 280 (5th Cir. 1964). Or that where First Amendment freedoms of expression and association are involved and state regulatory provisions affecting the practice of law present "the gravest danger of smothering all discussion looking to the eventual institution of litigation on behalf of the rights of members of an unpopular minority," *N. A. A. C. P.* v. *Button*, 371 U. S. 415, 434 (1963); or threaten the right of workingmen "to assist and advise each other", *Railroad Trainman* v. *Virginia Bar*, 377 U. S. 1, 6 (1964), otherwise legitimate state interests in regulation must give way before the more weighty constitutional freedoms and rights asserted. But in the present case, we are dealing with an entirely different matter. Nothing in this record or, so far as we know, in private antitrust litigation experience suggests that fully competent antitrust counsel is not available in every one of the States of the Union.*

In addition to these general considerations, certain circumstances peculiar to this action make review by this Court imperative. First, petitioners are all corporations. Consequently, they are not "citizens of the United States" entitled to the protection of the privileges and immunities clause. *Asbury Hospital* v. *Cass County*, 326 U. S. 207, 211 (1945); *Hague* v. *C. I. O.*, 307 U. S. 496, 514 (1939). Whether, if natural persons were involved, their right to retain respondent in aid of their prosecution of the industry suit in the District Court would be a privilege protected by that clause is thus quite irrelevant.

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* Indeed, the December, 1965 roster of members of the Section of Antitrust Law of the American Bar Association included attorneys from forty-nine of the fifty States; there were no members from North Dakota. 29 *A. B. A. Antitrust Section*, Part II (1965).

Second, the right, vindication of which, as the Court below holds, requires invalidation of the New York law, is a privilege of petitioners and not of respondent. (It is not suggested that any right of respondent is involved; indeed, it appears that an attorney has no constitutionally protected privilege to practice in any particular jurisdiction. See *Bradwell* v. *Illinois*, 16 Wall. 130 (1872); *In re Lockwood*, 154 U. S. 116 (1893); *Application of Levy*, 214 F. 2d 331 (5th Cir. 1954)). But petitioners here have not complained of any violation of constitutional rights or sought redress for any such violation, and "a litigant may only assert his own constitutional rights or immunities" *United States* v. *Raines*, 362 U. S. 17, 22 (1959).

In these circumstances, the decision below, not only unnecessarily deciding constitutional questions but unnecessarily creating novel constitutional doctrine, so far departs from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision. *United States* v. *Raines*, *supra*; *McGowan* v. *Maryland*, 366 U. S. 420, 429 (1961). Correction of such aberrations is especially important where, as here, the decision in question so greatly enlarges the powers of the federal courts at the expense of the States. For, "the happy relation of states to nation—our abiding political problem—is in no small measure dependent on the wisdom with which the scope and limits of the federal courts are determined." Frankfurter, "Distribution of Judicial Power Between United States and State Courts", 13 Cornell L. Q. 499, 500 (1928).

For all these reasons, a writ of certiorari should issue.

3. Finally, this case also presents the serious question whether there is the diversity of citizenship necessary to the jurisdiction of the courts below.

Petitioners are corporations incorporated in New York, New Jersey and Delaware and maintain their principal places of business in New York (R. 3a). Respondent al-

leged that he was a citizen of California (R. 3a), and the District Court found that at the time this action was commenced he was "domiciled in California, possibly in Missouri", but in any event not in New York (D. Ct. Op. R. 215a). The Court below affirmed this finding (Appendix B, *infra*, pp. 12a-14a, 23a).

We believe that the record clearly discloses, however, that respondent was a citizen of New York in October 1959, when this action was commenced. Before 1953, he was a resident of California (R. 59a). In 1955, pursuant to his agreement with Landis and petitioners to move his "principal place of business and residence" to New York, he moved to New York (R. 56a, 164a). In 1956, he married in New York and two children were born to him and his wife there; he performed substantial legal services there, occupied offices there and there invoked the laws of New York to assert a lien on the proceeds of the industry suit. (D. Ct. Op. R. 214a, R. 73a-74a). After 1955, he maintained no residence in California (*Id.*, R. 214a). Although he left New York in August, 1959, and moved to Missouri, he did so, as he himself testified, with no intention to make Missouri his residence (R. 57a-58a).

It is therefore clear that respondent continued to be a domiciliary of New York from 1955 to at least October, 1959, when this action was commenced. For, citizenship for an individual means domicile, which, in turn, means that place with which the individual has his principal contacts and in which he intends to reside permanently, or at least for an indefinite period. *Texas* v. *Florida*, 306 U. S. 398, 424 (1939).

If, notwithstanding these persuasive facts of continued citizenship in New York, respondent claimed establishment of a new domicile elsewhere prior to commencement of this action, he had the burden to prove that fact and he failed to do so. *Thompson* v. *Gaskill*, 315 U. S. 442 (1942);

McNutt v. *General Motors Acceptance Corp.*, 298 U. S. 178 (1935).

Reversal of the decision below and dismissal of the action for lack of jurisdiction are therefore essential.

CONCLUSION

For all these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MILTON C. WEISMAN,
HARRY I. RAND,
Attorneys for Petitioners,
1501 Broadway,
New York, New York.

Dated: September 26, 1966.

APPENDIX A

Statutes and Rules Involved

a. 28 U. S. C. 1654 (1964) reads, as follows:

"**§ 1654. Appearance personally or by counsel**

In all courts of the United States the parties may plead and conduct their own cases personally or by counsel, as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."

b. Prior to July 16, 1965, Section 270 of the Penal Law of the State of New York (39 McKinney's Consolidated Laws of New York, Annotated) read, as follows:

"**§ 270. Practicing or appearing as attorney-at-law without being admitted and registered**

It shall be unlawful for any natural person to practice or appear even as an attorney-at-law or as attorney and counselor-at-law for a person other than himself in a court of record in this state or in any court in the city of New York, or to furnish attorneys or counsel or an attorney and counsel to render legal services, or to hold himself out to the public as being entitled to practice law as aforesaid, or in any other manner, or to assume to be an attorney or counselor-at-law, or to assume, use, or advertise the title of lawyer, or attorney and counselor-at-law, or attorney-at-law or counselor-at-law, or attorney, or counselor, or attorney and counselor, or equivalent terms in any language, in such manner as to convey the impression that he is a legal practitioner of law or in any manner to advertise that he either alone or together with any other persons or person has, owns, conducts or maintains a law office or law and collection office, or office of any kind for the practice of law, without having first been duly and regularly licensed and admitted to practice law

in the courts of record of this state, and without having taken the constitutional oath and without having subscribed and taken the oath or affirmation required by section four hundred and sixty-eight of the judiciary law and filed the same in the office of the clerk of the court of appeals as required by said section. Provided, however, that nothing in this section shall be held to apply to officers of societies for the prevention of cruelty, duly appointed, when exercising the special powers conferred upon such corporations under section one hundred twenty-one of the membership corporations law."*

c. Prior to July 16, 1965, Section 271 of the Penal Law of the State of New York (39 McKinney's Consolidated Laws of New York, Annotated) read, as follows:

"§ 271. **None but attorneys to practice in the state**

No natural person shall ask or receive, directly or indirectly, compensation for appearing for a person other than himself as attorney in any court or before any magistrate, or for preparing deeds, mortgages, assignments, discharges, leases or any

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* Effective July 16, 1965, by L. 1965 c. 877, § 1, the second sentence containing the proviso was amended to read, as follows:

". . . Provided, however, that nothing in this section shall be held to apply (1) to officers of societies for the prevention of cruelty, duly appointed, when exercising the special powers conferred upon such corporations under section one hundred twenty-one of the membership corporations law; or (2) to law students in their senior or final year of law school acting under the supervision of a legal aid organization whose existence, organization or incorporation is approved by the appellate division of the supreme court of the department in which the principal office of such organization is located, when such students are acting under a program approved by that appellate division and specifying the extent to which the students may engage in activities otherwise prohibited by this statute."

other instruments affecting real estate, wills, codicils, or any other instrument affecting the disposition of property after death, or decedents' estates, or pleadings of any kind in any action brought before any court of record in this state, or make it a business to practice for another as an attorney in any court or before any magistrate unless he has been regularly admitted to practice, as an attorney or counselor, in the courts of record of the state; but nothing in this section shall apply to officers of societies for the prevention of cruelty, duly appointed, when exercising the special powers conferred upon such corporations under section one hundred and twenty-one of the membership corporations law.*

d. The pertinent provisions of the General Rules of the United States District Court for the Southern and Eastern Districts of New York read, as follows:

"**Rule 3. Admission to the Bar**

(a) A member in good standing of the bar of the State of New York, who has been such for at least

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* Effective July 16, 1965, by L. 1965, c. 877, § 2, the matter in Section 271 following the semicolon was amended to read, as follows:

". . . but nothing in this section shall apply (1) to officers of societies for the prevention of cruelty, duly appointed, when exercising the special powers conferred upon such corporations under section one hundred and twenty-one of the membership corporations law; or (2) to law students in their senior or final year of law school acting under the supervision of a legal aid organization whose existence, organization or incorporation is approved by the appellate division of the supreme court of the department in which the principal office of such organization is located, when such students are acting under a program approved by that appellate division and specifying the extent to which the students may engage in activities otherwise prohibited by this statute."

one year, or a member in good standing of the bar of a United States district court in New Jersey, Connecticut or Vermont and of the bar of the State in which such district court is located, provided such district court by its rules extends a corresponding privilege to members of the bar of this court, may be admitted to practice in this court on compliance with the following provisions:

"Each applicant for admission shall file with the clerk of this court, at least ten days prior to hearing thereon (unless, for good cause shown, the judge shall shorten the time), a verified written petition for admission stating: (1) his residence and office address; (2) the time when, and court where, admitted; (3) his legal training and experience; (4) whether he has ever been held in contempt of court, and if so the nature of the contempt and the final disposition thereof; (5) whether he has ever been censured, suspended or disbarred by any court and, if so, the facts and circumstances connected therewith; and (6) that he has read and is familiar with (a) the provisions of the Judicial Code (Title 28 U.S.C.A.) which pertain to the jurisdiction of, and practice in, the United States district courts, (b) the Rules of Civil Procedure for the district courts; (c) the Rules of Criminal Procedure for the district courts; (d) the Rules of the United States District Court for the Southern (Eastern) District of New York; and (e) that he has read the Canons of Ethics of the American Bar Association, and will faithfully adhere thereto.

"The petition shall be accompanied by an affidavit of an attorney of this court who has known the applicant for at least one year, stating when the affiant was admitted to practice in this court, how

long and under what circumstances he has known the applicant, and what he knows of the applicant's character and experience at the bar. Such petition shall be placed at the head of the calendar and, on the call thereof, the attorney whose affidavit accompanied the petition shall personally move the admission of the applicant. If the petition is granted, the applicant shall take the oath of office and sign the roll of attorneys."

* * *

(b) A member in good standing of the bar of the United States District Court for the Southern (Eastern) District of New York may be admitted to the bar of this court without formal application (1) upon filing in this court a certificate of the clerk of the United States District Court for the Southern (Eastern) District of New York, issued within 30 days, that he is a member in good standing of the bar of that court and (2) upon taking the oath of office, signing the roll of attorneys of this court and paying the fee required in this district.

(c) A member in good standing of the bar of any state, or of any United States district court, may upon motion be permitted to argue or try a particular cause in whole or in part as counsel or advocate. Only an attorney or proctor of this court may enter appearances for parties, sign stipulations or receive payments upon judgments, decrees or orders.

Rule 4. Attorneys of Record and Parties Appearing Pro Se

(a) No member of the bar of this court not having an office within the Southern or Eastern District of New York shall appear as attorney or proctor of record in any cause without designating with his initial notice or pleading a member of the bar of either district having an office within the Southern or Eastern District of New York upon whom service of papers may be made.

Rule 5. Discipline of Attorneys

(a) The chief judge shall have charge of all matters relating to the discipline of members of the bar.

(b) The court may make an order in a disciplinary proceeding disbarring, suspending or censuring, or taking such other action as justice may require, with respect to a member of the bar of this court

(1) who has resigned from the bar of a court of any State, Territory, District, Commonwealth or Possession;

(2) who has been disbarred, suspended from practice or censured in any State, Territory, District, Commonwealth, or Possession;

(3) who has been convicted of a crime involving moral turpitude in any State, Territory, District, Commonwealth or Possession; or

(4) who is guilty of conduct unbecoming a member of the bar of this court. Without limiting the generality of the foregoing, such misconduct shall be deemed to include fraud, deceit, malpractice, conduct prejudicial to the administration of justice, or violation of the Canons of Ethics of the American Bar Association or of the New York State Bar Association.

(c) Cases within subdivisions (1), (2) and (3) of Paragraph (b) may be referred by the chief judge to the United States Attorney, who shall proceed against the respondent by a petition setting forth the charges against him and an order requiring him to show cause within thirty days after service thereof on him, personally or by mail, of the petition and order why he should not be disciplined. Upon the filing of such a petition the chief judge may, for good cause, temporarily suspend the respondent, pending the determi-

nation of the proceeding. Upon respondent's answer to the petition, the chief judge may set the matter for prompt hearing before a court of one or more judges, or may appoint a master to hear and report his findings and recommendations. After such a hearing or report, or if no timely answer is made by the respondent, the court shall take such action as justice may require.

(d) Cases within subdivision (4) of Paragraph (b) shall be presented to the chief judge, and, if he deems the charges of professional misconduct of sufficient weight, he shall refer them for preliminary investigation and recommendation to a bar association in the county where the member has his office or in his discretion to the United States Attorney. The recommendation shall be presented to the chief judge.

Thereupon, with the approval of the chief judge, the United States Attorney or counsel designated by the court shall proceed against the respondent by a petition setting forth the charges against him and an order requiring him to show cause within thirty days after service on him, personally or by mail, of the petition and order why he should not be disciplined. Upon respondent's answer to the petition, the chief judge may set the matter for prompt hearing before a court of one or more judges, or may appoint a master to hear and report his findings and recommendations. After such a hearing or report, or if no timely answer is made by the respondent, the court shall take such action as justice may require.

(e) The court, with the consent of the respondent, may order a disciplinary hearing to be private and direct the papers to be sealed and impounded.

(f) Whenever it appears that an attorney at law admitted to practice in the court of any State, Territory, District, Commonwealth or Possession is convicted of any crime, or is disbarred or suspended, in this court, the clerk

shall transmit to the court of the State, Territory, District, Commonwealth or Possession where the attorney was admitted to practice a certified copy of the judgment of conviction or order of disbarment or suspension and a statement of his last known office and residence addresses.

(g) A visiting lawyer permitted to argue or try a particular cause in accordance with Rule 3(c) who is found guilty of professional misconduct may be precluded from again appearing at the bar of this court. Upon the entry of and order of preclusion, the clerk shall transmit to the court of the State, Territory, District, Commonwealth or Possession where the attorney was admitted to practice, a certified copy thereof, and of the court's opinion.

APPENDIX B

Opinions of the United States Court of Appeals for the Second Circuit

a. Opinions of three-judge panel.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 4—September Term, 1965.

(Argued December 8, 1965 Decided March 18, 1966.)

Docket No. 29430

NICK C. SPANOS,

Plaintiff-Appellee,

v.

SKOURAS THEATRES CORPORATION, THEATRE & CINEMA, INC., PHILHAMBRO, INC., YOUNGSTOWN THEATRE CORPORATION and MODERN PLAYHOUSES, INC.,

Defendants-Appellants.

Before:

LUMBARD, *Chief Judge,*
FRIENDLY and SMITH, *Circuit Judges.*

Appeal from a judgment in a diversity suit in the United States District Court for the Southern District of New York, Inzer Wyatt, *J.*, awarding plaintiff $89,606.29 in

quantum meruit for legal services and dismissing a counterclaim for return of fees paid. Judgment for plaintiff reversed and dismissal of counterclaim affirmed.

RICHARD GYORY, New York, N. Y. (Levin Kreis Ruskin & Gyory, New York, N. Y., on the brief), *for plaintiff-appellee.*

MILTON C. WEISMAN, New York, N. Y. (Adolph Kaufman, Leonard H. Dickstein, Weisman, Celler, Allan, Spett & Sheinberg, New York, N. Y., on the brief), *for defendants-appellants.*

LUMBARD, *Chief Judge*:

The principal question for decision is whether an out-of-state attorney can recover for legal services rendered in an antitrust suit in a New York federal court when he has not been admitted to the bar of New York State or of the federal court.

Defendants, Skouras Theatres and inter-related companies, appeal from a judgment in a diversity suit in the Southern District Court awarding Nick C. Spanos $89,606.29 as additional fees for legal services performed from 1953 to 1958 in connection with an antitrust suit instituted by the defendants in the Southern District Court, and dismissing defendants' counterclaim for the return of $83,013.49 already paid, plus interest.[1]

The trial court, after finding that diversity of citizenship existed because Spanos was not a New Yorker, held that

[1] No appeal is taken by plaintiff from the dismissal of his first count based on an alleged contract for a 17½ percent contingent fee. The trial judge found a contingent fee had been promised but that the amount had not been agreed upon.

plaintiff's failure to become a member of the New York bar did not preclude his recovering legal fees earned in connection with federal antitrust litigation in New York. We agree with the lower court that diversity jurisdiction existed but find that his failure to enter a special appearance in the federal court prevents recovery.

Because of our disposition the issues on appeal are limited and the facts, fully set forth in Judge Wyatt's careful opinion, 235 F. Supp. 1 (S. D. N. Y. 1964), can be summarized briefly. Spanos graduated from law school in 1947, having written a research paper about the movie industry and the antitrust laws. After a year in New York working in the motion picture antitrust field, he went to California where on January 4, 1949 he became a member of the California bar and commenced practice.

Spanos' success in winning a large treble damage award in a suit conducted in California and Missouri federal courts brought him to the attention of George Skouras, the dominant figure in the movie theatre companies which are defendants here. Skouras planned to bring a similar suit (known as the "industry suit") against the major movie producers for violation of the antitrust laws in the New York metropolitan area. Preparation of that case, which involved three law firms in addition to the companies' house counsel, had already begun and a draft complaint had been circulated among the proposed defendants, leading to settlement negotiations with one.

Skouras requested that Spanos confer with him in New York City late in 1952 and he persistently sought to bring him into the litigation despite Spanos' hesitancy. In the spring of 1953 Spanos made four trips to New York to attend settlement conferences and in California he did research work on the suit. Letters in June 1953 from Skouras to Spanos and from Spanos to James M. Landis, one of Skouras' lawyers, show that Spanos had agreed to work on the industry suit in association with Dean Landis for an undetermined part of Landis' contingent fee and with

a minimum yearly guarantee of $15,000 as long as the industry case remained pending.[2] Spanos agreed to "move my principal place of business and my residence to New York City" by January 4, 1954.

Although Spanos worked extensively on the industry case, he did not move to New York until 1955. In 1956 Landis' firm withdrew, leaving Spanos' status uncertain. The trial judge found that Skouras then renewed the promise of a contingent fee and a $15,000 yearly minimum with the amount of the contingent fee again left open. Spanos' activities, however, decreased greatly thereafter, and when in August 1958 Skouras' lawyers negotiated a settlement with two of the defendants in the industry suit Spanos only learned about it through the newspapers in September. When he wrote to Skouras Theatres demanding payment of his contingent fee, Skouras discharged him. Spanos brought this action a year later on October 13, 1959.

I

Diversity jurisdiction in this case exists unless Spanos was a citizen of New York when the suit was commenced since the defendants are corporations with their principal place of business in New York. We agree with the district court that he was not a New Yorker.

When the suit began Spanos was resident in Missouri, having moved there in the summer of 1959 with his family. However, he declared at trial that his residence was temporary because he intended to return to California.

Domicile, on which citizenship is based, consists of residence in fact, coupled with the purpose to make the place of residence one's home. *Texas* v. *Florida*, 306 U. S. 398

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[2] The defendants here agreed to guarantee the fee. For a short time Landis made the monthly payments of the minimum fee to Spanos and was reimbursed by Skouras; after September 1953 the checks came directly from Skouras Theatres.

(1939). An old domicile continues even though a new residence is established until there is the intention to create a new home. *Desmare* v. *United States*, 93 U. S. 605 (1877); Restatement of the Law of Conflicts of Law § 23.

Appellants contend that Spanos could not have been a California citizen because he had abandoned all residence there in 1955, but that standard he would not have been a citizen of New York in October 1959 either. Unless his domicile in California was superseded by one in New York, his absence from California would be irrelevant. Thus the district court was called upon to determine whether Spanos intended to make New York his home at any time while he was living there. There is no evidence at all as to where he voted, paid taxes, or about his social contacts, nor any contemporaneous statements as to his intent. Appellants can only point to Spanos' New York residence—and, after his marriage in 1956, to that of his wife and family—and to the fact that New York was his principal place of business.

On the other hand, Spanos never applied to become a member of the New York bar although he could have applied for admission on motion after six months' residence in New York.[3] His contacts with California continued: he maintained an office in Los Angeles continuously, hired associates there, and made frequent trips to the West Coast. During 1955-1957 he received fees of at least $347,000 for cases conducted outside of New York. The trial judge found that "his purpose in coming to New York was in connection

[3] Under New York Court of Appeals Rule VII-1, Rules for Admission of Attorneys and Counsellors-at-Law, the Appellate Divisions may admit without an examination persons who were admitted and had practiced for five years before the highest law court or highest court of original jurisdiction of the state in which they resided, after they have resided in New York six months. Spanos had been a member of the California bar for over six years when he moved to New York in 1955.

with the services for which he here sues. It seems fair to infer that his intention was to give up any residence in New York when these services were concluded." We accept this finding.

II.

Spanos' right to any recovery presents a more difficult problem. New York implements its strong policy against the practice of law in New York by persons not licensed and admitted to practice by the State, New York Penal Code § 270, by refusing to permit suit for the recovery of fees for such unlawful practice. *Spivak* v. *Sachs*, 16 N. Y. 2d 163, 263 N. Y. S. 2d 953 (1965).

The district court granted recovery on the ground that Spanos' admitted legal services were a "solitary incident" rather than a continuing course of conduct, and thus did not constitute the "practice" of law as defined and made unlawful by § 270. Alternatively, it held that New York could not prevent compensation of an attorney concerning a matter dealing solely with federal law in a federal court.

The *Spivak* case, upon which Judge Wyatt relied to construe the scope of the word "practice" in the New York statute, was overruled on October 21, 1965. *Spivak* v. *Sachs*, *supra*, revg, 250 N. Y. S. 2d 666 (1st Dept. 1964). In that case, Spivak, a California lawyer, came to New York at the request of a client—who knew that he was not admitted to practice in New York or Connecticut—to give advice on the terms of a property settlement and the handling of a divorce suit already begun in Connecticut. He conferred with the client and her New York lawyers over a period of two weeks. The Court of Appeals rejected the decision of the lower court that these legal services were a "single, isolated incident" rather than the "practice" of law and reversed the judgment awarding compensation. "To say, that [Spivak's activity] falls short of the 'practice of law' in New York is to defeat section 270 and the policy it

represents," Chief Judge Desmond declared. "The statute aims to protect our citizens against the danger of legal representation and advice given by persons not trained, examined and licensed for such work, whether they be laymen or lawyers from other jurisdictions." 16 N. Y. 2d at 167-68, 263 N. Y. S. 2d at 956. In light of that decision, Spanos' activities over a six-year time span, even though related to a single case, must now be considered practicing law.

The New York decisions hold that unlawful practice includes counseling as well as court appearances, *People* v. *Alfani*, 227 N. Y. 334, 125 N. E. 671 (1919). And it extends to advice involving federal law as well as New York law. In *In re Bercu*, 273 App. Div. 524, 78 N. Y. S. 2d 209 (1st Dept. 1948), aff'd 299 N. Y. 729 (1949) the court restrained an accountant from advising on a matter of federal tax law. Recently the Court of Appeals affirmed an order restraining a Mexican lawyer from giving advice about Mexican divorce law, declaring that "whether a person gives advice as to New York law, Federal law, the law of a sister state, or the law of a foreign country, he is giving legal advice" in violation of the statute. *In re Roel*, 3 N. Y. 2d 224, 229, 165 N. Y. S. 2d 31, 35 (1957).

The broad sweep of New York decisions culminating in *Spivak* makes it clear that virtually no legal services may be rendered in New York by a person not admitted to the state bar except for "customary and innocuous practices" in transactions only "somehow" tied to New York. *Spivak* v. *Sachs, supra*, 16 N. Y. 2d at 168, 263 N. Y. S. 2d at 956. In this regard it is important to note that Spanos was not merely consulting with his clients' local lawyers, a practice which indeed is common. Spanos, according to the trial judge, "worked directly with the Skouras companies and independently of Landis. Certainly he was not under any supervision of Landis and their association was in name only. Spanos put it in a letter in July 1953 that his hiring

was to be 'full and equal' with Weisman, Sherpick and Landis." 235 F. Supp. at 7. "The 'association' between Landis and Spanos was only on paper; and from the beginning Spanos had been dealing directly with George [Skouras] and the Skouras companies." 235 F. Supp. at 8. However broadly the exception for normal inter-state practice may be interpreted, certainly five years of work on an important legal matter for New York plaintiffs in a case involving antitrust violations which occurred in the New York area would be prohibited. The New York courts would refuse to grant recovery to Spanos if it were within their power to do so.

III.

Because the advice Spanos gave was related to federal antitrust law in connection with litigation filed and pending in a federal court,[4] Judge Wyatt held that federal law must govern whether Spanos could recover for his services so that "local policy [could not] obstruct the conduct of business in federal courts." The question is to what extent the federal government has exercised its power and whether Spanos qualified to receive its benefits.

We agree with Judge Wyatt that it is within the power of the federal government to determine who will be permitted to practice in its courts and that this includes allowing compensation for services rendered in regard to litigation in the federal courts. This was the teaching of *Sperry* v. *Florida*, 373 U. S. 379 (1963), where the Supreme Court held that the state law against unauthorized practice could not apply to appearances by a layman licensed by the U. S. Patent Office to practice before it. But the court restricted its holding to a very narrow range of permissible activities and recognized the states' role: "Nor do we doubt

[4] The complaint was filed June 3, 1953. It was dismissed with leave to amend in July 1953 and an amended complaint was filed in September 1953.

that Florida has a substantial interest in regulating the practice of law within the State and that in the absence of Federal legislation it could validly prohibit non-lawyers from engaging in this circumscribed form of patent practice. But 'the law of the State, though enacted in the exercise of powers not controverted, must yield' when incompatible with federal legislation." 373 U. S. at 383-84. The basis for federal pre-emption was found in the long history and implied Congressional approval of patent practice by laymen, including an administrative licensing scheme.

Although the First Congress acted on the premise of federal power and delegated regulation of counsel to the courts in Section 35 of the Judiciary Act of 1789, now 28 U. S. C. § 1654,[5] the courts for the most part have been content to leave the regulation of attorney qualifications in the first instance to the state in which each court sits. However, it has been held that lawyers admitted to practice in a federal court are not automatically disbarred when the state has disbarred them. *Theard* v. *United States*, 354 U. S. 278 (1957); *Selling* v. *Radford*, 243 U. S. 46 (1917). It is implicit in those decisions that a person not licensed to practice in a state can practice law in the federal courts of that state. See *Ginsburg* v. *Kovrak*, 392 Pa. 143, 139 A. 2d 889, appeal dismissed for want of a substantial federal question, 358 U. S. 52 (1958).

More important, the rules of the federal courts concerning admission of attorneys have long recognized that experts in federal law should be permitted, when appropriate, to conduct litigation in the federal courts regardless of whether they have been admitted to practice in the state in which the court sits. The rules of the federal

[5] "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel, as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."

district courts in New York State do not restrict admission to members in good standing of the New York bar.[6] All four district courts permit admission *pro hac vice* of any attorney who is a member of the bar of any state. E.g., Rule 3(c), General Rules, Southern and Eastern Districts of New York.[7] These rules express a policy that the New York Federal courts, which are open to litigants from all parts of the country and which deal with matters of national interest often unconnected with state law, should not limit the practice before them to attorneys of a single state. Obviously the proper conduct of litigation in our federal courts would be frustrated unless the federal policy were paramount.

Thus Spanos could have applied for leave to appear in the industry suit in the Southern District Court under Rule 3(c). Had he been admitted he would be entitled to reasonable compensation despite the contrary policy in New York.

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[6] Rule 3(a) of the Southern and Eastern District Courts allows admission of "a member in good standing of the bar of a United States district court in New Jersey, Connecticut or Vermont and of the bar of the State in which such district court is located, provided such district court by its rules extends a corresponding privilege to members of the bar of this court." The rules of the district courts of Connecticut and Vermont do extend corresponding privileges to members of the New York district courts; the New Jersey district court does not.

Rule 2(c) of the Northern and Western District courts allow admission upon motion by a member of the court to a member of any district court provided he is also admitted to practice in the highest court of the state in which he maintains an office.

At least 20 district courts permit general admission to lawyers not admitted in the state in which the court sits.

[7] "A member in good standing of the bar of any state, or of any United States district court, may upon motion be permitted to argue or try a particular cause in whole or in part as counsel or advocate. Only an attorney or proctor of this court may enter appearances for parties, sign stipulations or receive payments upon judgments, decrees or orders."

Unfortunately, however, Spanos did not apply for admission under Rule 3(c).[8] Judge Wyatt thought this was of no consequence, declaring that application was a mere formality, that Spanos would have been admitted as a matter of course, and therefore permitted him to recover. We do not think Spanos' failure to be admitted *pro hac vice* can be excused in this way. Clearly admission was called for; as Judge Wyatt's opinion makes clear, Spanos was not operating under the supervision or control of the other attorneys. We cannot presume that application would be a formality in every case because there may be circumstances which might well lead a court to deny admission, a matter which many cases declare to be within "the sound judicial discretion of the trial court." *Atchison, Topeka and Santa Fe Ry. Co.* v. *Jackson,* 235 F. 2d 390 (10 Cir. 1956). And we can hardly believe that the admission of lawyers to participate in protracted litigation is a matter to be treated lightly, especially in view of New York's evident concern to uphold the standards of practice in the state. Therefore it would be inadvisable to lay down a rule which, in many instances, would require other federal or state courts to speculate whether a particular district court would or would not have admitted a particular attorney. Considering that the primary responsibility for the regulation of those who may practice law lies with the state and that an exception from such regulation for persons conducting federal litigation exists only because of the federal statute and rules of the district court, we feel compelled to limit recovery for services to attorneys who have fully complied with the rules creating the exception of which they seek to take advantage.

Nor do we think it would be proper for the Southern District Court to have admitted Spanos *nunc pro tunc* after October 13, 1958, even though the industry suit was still

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[8] Spanos did apply and was admitted to appear specially in the District Court for the Eastern District, but the record does not reveal when this occurred or the nature of the cases.

pending. Rule 3(c) is to permit attorneys to appear before the court; having been discharged from the case, the only purpose in admitting Spanos would be to legitimatize his earlier activities so that he could recover his fees.

The defendants counterclaimed for the return of the $83,013.49 which they had already paid Spanos for his services, plus interest. The district court denied the counterclaim and the defendants have appealed this ruling. The New York rule in such a case is to leave the parties as they are. *Spivak* v. *Sachs, supra,* 16 N. Y. 2d at 168, 263 N. Y. S. 2d at 957.

The judgment of the district court is reversed insofar as it awarded Spanos $89,606.29 and affirmed insofar as it dismissed the counterclaim of the defendants. The complaint is dismissed.

FRIENDLY, *Circuit Judge* (dissenting as to the claim and concurring as to the counterclaim):

The compulsion felt by my brothers to apply the New York Court of Appeals' *Spivak* decision to reach what seems a palpably unjust result reminds me of Chief Justice Erle's observation as to the occasional predilection of the best of judges for "a strong decision," to wit, one "opposed to common-sense and to common convenience."[1] I do not believe a federal court is so hamstrung by New York's parochialism as my brothers think it to be; one of the very purposes of federal jurisdiction is to protect against state policies that fail to recognize the extent to which the many have become one. Spanos' services were rendered in the prosecution of a federal claim in the same federal district

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[1] He continued that "as one strong decision is a precedent for another a little stronger, the law at last, on some matters, becomes such a nuisance that equity intervenes, or an Act of Parliament must be passed to sweep the whole away." Senior, Conversations with Distinguished Persons 314 (1880 ed.), quoted in Pound, Mechanical Jurisprudence, reprinted in Landmarks of Law 101, 103-04 (1960).

court where he is seeking to recover the fee his client promised him. When that court has chosen to do now what it would assuredly have done if Skouras' bevy of New York lawyers had seen to it that their California brother had earlier sought admission *pro hac vice,* I see no reason why we should interfere. And, as my brothers agree, once Spanos has been so admitted, the supremacy clause insulates him from New York decisions drastically limiting the permissible activity of out-of-state attorneys.

I would allow Judge Wyatt's fair and sensible decision to stand.

b. Opinions of *in banc* Court.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 4—September Term, 1965.

(Submitted to the Court
in banc June 20, 1966

Decided August 2, 1966.)

Docket No. 29430

NICK C. SPANOS,

Plaintiff-Petitioner,

v.

SKOURAS THEATRES CORPORATION, THEATRE & CINEMA, INC., PHILHAMBRO, INC., YOUNGSTOWN THEATRE CORPORATION and MODERN PLAYHOUSES, INC.,

Defendants-Respondents.

Before:

LUMBARD, *Chief Judge*,

WATERMAN, MOORE, FRIENDLY, SMITH, KAUFMAN, HAYS, ANDERSON and FEINBERG, *Circuit Judges.*

LEVIN, KREIS, RUSKIN & GYORY, New York City (Kissam & Halpin, Leo T. Kissam, Richard Gyory, Anthony S. Genovese of counsel), *for plaintiff-appellee.*

WEISMAN, CELLER, ALLAN, SPETT & SHEINBERG, New York City (Milton C. Weisman, Adoph Kaufman, and Leonard H. Dickstein), *for defendants-appellants.*

ALBERT R. CONNELLY, *for Association of the Bar of the City of New York, amicus curiae.*

BERNARD A. GROSSMAN, *for Federal Bar Association of New York, New Jersey and Connecticut, amicus curiae.*

DANIEL M. SHIENTAG (Sidney Pepper of counsel), *for New York County Lawyers' Association, amicus curiae.*

JAMES AMADEI and others, *for New York State Bar Association, amicus curiae.*

FRIENDLY, *Circuit Judge*:

The panel that heard this appeal, consisting of Chief Judge Lumbard, Judge Smith and the writer, found no merit in any of the defendants' challenges to the judgment below in favor of Spanos except the claim, which the majority sustained over my dissent, that the contract for his legal services violated § 270 of the New York Penal Law condemning the unlicensed practice of law, as recently construed in *Spivak* v. *Sachs*, 16 N. Y. 2d 163, 263 N. Y. S. 2d 953 (1965). We later ordered that the appeal be reconsidered *in banc;* the parties were given leave to file additional briefs and bar associations were permitted to file *amici* briefs on the defense of illegality.[1] The conclusion of the full court differs from that of the panel.

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[1] The positions of the bar associations differ. The Association of the Bar of the City of New York urges affirmance on the broad ground that an attorney licensed in one state may not constitutionally be forbidden to advise with respect to a federal claim in another. The Federal Bar Association of New York, New Jersey and Connecticut advocates affirmance on the grounds that Spanos was acting under the supervision of licensed New York attorneys and that defendants are estopped to question the regularity and propriety of his position. The New York County Lawyers' Association opposes the idea that an attorney licensed by another state may lawfully give independent advice as to federal matters in New York without having regularized his position through admission *pro hac vice* or otherwise, but suggests that the record may support a finding that Spanos was at all times working under the direction, control and supervision of one or more members of the New York bar and, if so, there would be no illegality. The New York State Bar Association supports the decision of the panel majority.

In the first place, we think Judge Wyatt was correct in concluding that a right to recover could be predicated on Rule 3(c) of the District Court for the Southern District of New York providing that "a member in good standing of the bar of any state . . . may upon motion be permitted to argue or try a particular cause in whole or in part as counsel or advocate." The contract engaging Spanos to work on the suit for damages under the antitrust laws, 15 U. S. C. § 15, which defendants proposed to bring in the Southern District can fairly be construed as contemplating court appearances on his part. When the defendants engaged him to that end, they impliedly assumed the obligation of having their New York lawyers in the action make any motion that was necessary to render such appearances lawful. There is not the slightest reason to suppose that if by their lawyers defendants had sought admission *pro hac vice* for the colleague whose services they had been at such pains to secure, the motion would have been denied; Judge Wyatt found that Spanos "is well trained in law and is a member in good standing of the California bar," that there was no suggestion of any unlawyerlike conduct on his part, and that accordingly it "cannot seriously be doubted that at any time on motion, the admission of Spanos *pro hac vice* would have been authorized by this court." 235 F. Supp. at 11. Compare *Schifrin* v. *Chenille Mfg. Co.*, 117 F. 2d 92 (2 Cir.), cert. denied, 313 U. S. 590 (1941); *Atchison, T. & S. F. Ry.* v. *Jackson*, 235 F. 2d 390 (10 Cir. 1956). We cannot accept the contention that if such leave to appear had been sought and granted, Spanos could recover only for court appearances and not for other legal work in the suit; under 28 U. S. C. § 1654, stemming from § 35 of the First Judiciary Act, 1 Stat. 92 (1789), the grant of leave would have given official recognition to his status as an attorney in the district for all purposes of the action and would have insulated him from § 270 of the New York Penal Law with

respect to any legal services reasonably incident to the activities the District Court had authorized. Spanos' contract was thus susceptible of being lawfully performed without his being admitted to the New York bar and cannot be considered an illegal bargain. Such is the holding of *Tuppela* v. *Mathison*, 291 Fed. 728 (9 Cir. 1923), and *Cochran* v. *Burdick*, 70 F. 2d 754 (D. C. Cir.), cert. denied, 293 U. S. 561 (1934). See also *In re Waring's Estate*, 35 L. W. 2017 (Sup. Ct. N. J. 1966). Cf. *56-70 58th St. Holding Corp.* v. *Fedders-Quigan Corp.*, 5 N Y. 2d 557, 186 N. Y. S. 2d 583 (1959); *Cochran* v. *Hurth*, 29 Ohio App. 305, 163 N. E. 560 (1927). Defendants could not render the contract unlawful and unenforceable by discharging Spanos and thereby cutting off his opportunity to validate his status through *pro hac vice* admission in the industry suit before court appearance on his part. "One who unjustly prevents the performance or the happening of a condition of his own promissory duty thereby eliminates it as such a condition. He will not be permitted to take advantage of his own wrong, and to escape from liability for not rendering his promised performance by preventing the happening of the condition on which it was promised." 3A Corbin, Contracts § 767, at 540 (1960); *E. I. DuPont de Nemours Powder Co.* v. *Schlottman*, 218 Fed. 353 (2 Cir. 1914), cert. denied, 235 U. S. 705 (1915); *George W. Garig Transfer, Inc.* v. *Harris*, 226 La. 117, 75 So. 2d 28 (1954); *Wissahickon Realty Corp.* v. *Boyle*, 385 Pa. 198, 122 A. 2d 720 (1956); 5 Williston, Contracts § 1293A. (rev. ed. 1937).

While this would suffice to dispose of the case, the importance of the problem and the desirability of furnishing guidance to the bar lead us to consider other grounds that have been urged for affirmance. The New York County Lawyers' Association suggests that Spanos may have acted under the control and supervision of duly admitted New York attorneys who alone were responsible to the client, in a status resembling that of the unlicensed law clerk which has never been supposed to violate § 270 in the ab-

sence of court appearance or a holding out as the giver of independent legal advice. It is clear there was no thought of Spanos' being the sole lawyer in the industry suit. Defendants' initial proposal was that he prepare the case for trial by Eugene Sherpick, a prominent New York trial lawyer; Spanos agreed to come to New York only on the understanding that he was to be associated with Dean Landis whom he wanted to be his "link to this case"; and when Mr. Sherpick and Dean Landis formally withdrew in 1956, the agreement between the defendants and Mr. Weisman's firm for continuing the litigation stated that the firm should "have the aid and cooperation of Nick Spanos." On the other hand, the record would not support a conclusion that Spanos' relations with the New York lawyers bore any real analogy to that between a law clerk and his employer. Spanos felt free to criticize the New York lawyers to the client and insisted he "was to have a status in the case full and equal with that of every other lawyer," including Mr. Sherpick and Dean Landis; moreover he was generally paid, and ultimately discharged, not by any of the New York lawyers but by the defendants, and claimed an attorney's lien. We find it unnecessary, however, either to determine precisely what the relationship was or to endeavor to predict whether the New York Court of Appeals would consider Spanos' conduct within the condemnation of § 270 of the Penal Law. For we hold the under the privileges and immunities clause of the Constitution no state can prohibit a citizen with a federal claim or defense from engaging an out-of-state lawyer to collaborate with an in-state lawyer and give legal advice concerning it within the state.

We recognize that the guarantee against abridgment of the privileges and immunities of citizens of the United States could lend itself to "mischievous uses" if its scope were not confined to those interests "growing out of the relationship between the citizen and the national government, created by the Constitution and federal laws," *Adam-*

son v. *California*, 332 U. S. 46, 61 (1947) (Frankfurter, *J.*, concurring); *Colgate* v. *Harvey*, 296 U. S. 404, 444 (1935) (Stone, *J.*, dissenting), overruled, *Madden* v. *Kentucky*, 309 U. S. 83 (1940); and we note the "judicial reluctance to expand the content of national citizenship . . . due to a fear of creating constitutional refuges for a host of rights historically subject to regulation." *Bell* v. *Maryland*, 378 U. S. 226, 250 (1964) (opinion of Douglas, *J.*). We are persuaded, however, that where a right has been conferred on citizens by federal law, the constitutional guarantee against its abridgment must be read to include what is necessary and appropriate for its assertion. In an age of increased specialization and high mobility of the bar, this must comprehend the right to bring to the assistance of an attorney admitted in the resident state a lawyer licensed by "public act" of any other state who is thought best fitted for the task, and to allow him to serve in whatever manner is most effective, subject only to valid rules of courts as to practice before them. Cf. *Lefton* v. *City of Hattiesburg*, 333 F. 2d 280, 285 (5 Cir. 1964). Indeed, in instances where the federal claim or defense is unpopular, advice and assistance by an out-of-state lawyer may be the only means available for vindication. The broadening of district court rules as to admission suggested in the dissenting opinion is no adequate solution. The federal matter on which the help of a non-resident specialist is sought may be pending in a different state or may not be a suit at all, and specialized legal advice may be needed without the delay or expense incident to admission by a federal court before which the attorney may not have any intention of practicing, even if that were available and would afford sufficient validation. Having exercised their constitutional right to obtain the expert legal assistance on their antitrust claim which they desired, defendants cannot be heard to object to paying the bill.

Here, beginning with a paper written while still in law school, Spanos had concentrated on antitrust problems in the motion picture industry—a subject requiring detailed

knowledge both of the decisions and of complex business practices; it was the knowledge and skill thus acquired that the defendants wished to bring to the aid of their New York attorneys in preparing the antitrust suit. Under the Constitution we perceive no basis on which New York could throw up a significant block to such assistance, for example, by making it a crime to engage in more than a one or two day consultation within its borders and insisting that examination of defendants' files, interviewing of witnesses and other time-consuming tasks essential to the rendition of proper legal advice and the effective pursuit of the antitrust claims should either be left to New York lawyers or be performed at great inconvenience where New York's writ does not run. The problem is by no means limited to antitrust litigation; similar requirements for specialized legal services frequently arise as to federal rights relating to such esoteric subjects as income taxation, patents, copyrights, trademarks, and securities and labor regulation. If a corporation operating across state lines wishes a particular lawyer or firm of lawyers to supervise the handling of all its problems in one of such fields, we do not see how a state can constitutionally insist that a local manager come to the expert, bearing bales of papers with him, rather than *vice versa*. Although in *Sperry* v. *Florida*, 373 U. S. 379 (1963), the Court was not required to go so far, our decision accords with the decision's major thrust—that Florida could not require its inventors desiring the help of patent specialists to betake themselves and their materials to the District of Columbia.[2] See also *Brotherhood of Railroad Trainmen* v. *Virginia*, 377 U. S. 1, 7 (1964).

The Association of the Bar of the City of New York urges us to take an even broader ground that would render

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[2] We read the Chief Justice's qualifying statement that "in the absence of federal legislation, it [Florida] could validly prohibt *nonlawyers* from engaging in this circumscribed form of patent practice," 373 U. S. at 383 (emphasis added), to mean exactly what it says.

the participation of a licensed in-state lawyer irrelevant. A good deal can be said for such a position; for example, in the case just put of the corporation having nationwide operations, it would seem absurd that when the out-of-state trademark specialist goes to a local branch, he should be required to obtain the assistance of a resident general practitioner for whose views he would have little regard. Yet there is also a case for the other side. The disparity in requirements for admission to the bar gives a state maintaining high qualification standards some interest in seeing that its residents do not take action even on a federal right solely on the advice of a lawyer from another state; moreover, what is basically a federal claim or defense may depend in part on an "issue or claim which has its source in state law." *Maternally Yours, Inc.* v. *Your Maternity Shop, Inc.*, 234 F. 2d 538, 541 n. 1 (2 Cir. 1956). We thus limit our holding to the situation here presented, where a citizen has invited a duly licensed out-of-state lawyer to work in association with a local lawyer on a federal claim or defense. Whether § 270 of the New York Penal Law could apply if the client in such a case dispensed with the local attorney or if the matter were one in which federal jurisdiction rested only on diverse citizenship, are questions better left to another day. And we in no way sanction a practice whereby a lawyer not admitted to practice by a state maintains an office there and holds himself out to give advice to all comers on federal matters.

The judgment of the District Court in favor of Spanos is affirmed.

HAYS, *Circuit Judge* (concurring in the result):

I subscribe to the position taken in the amicus brief of the Association of the Bar of the City of New York. If Section 270 of the New York Penal Law is correctly con-

strued to prevent Spanos' giving advice in New York on federal law, whether with or without the collaboration of a New York lawyer, then the Section is invalid under the privileges and immunities clause of the Constitution.

LUMBARD, *Chief Judge*, with whom Judge Smith concurs, dissenting:

I adhere to the views previously expressed, and would reverse the judgment for the plaintiff.

Spanos admittedly was practicing law in New York during the five years he prepared the industry suit for Skouras, under a direct arrangement with Skouras and in collaboration with the other attorneys also retained by Skouras.

Spanos was not admitted to practice law in New York by the New York courts. Therefore he may recover only if he was admitted to the federal court of the district where the litigation was in progress or if he obtained leave to practice in the particular case. He did neither.

For reasons which are set forth in the majority opinion for the panel, the federal court sitting in New York ought to honor the strong public policy of New York and the failure to comply with the rules of the Southern District, by refusing to permit recovery of any additional fees not already paid.

Judge Friendly's opinion now supports recovery on the theory that no state can prohibit a citizen with a federal claim from engaging an out-of-state lawyer to collaborate with an in-state lawyer because of the privileges and immunities clause of the Constitution. No necessity is shown for this unprecedented application of privileges and immunities; to apply it here tortures a concept which has nothing to do with the issues before us. New York has not prohibited Skouras from retaining Spanos. Indeed, no one has interfered with Skouras retaining Spanos. Obviously Skouras is not complaining here.

The fact that Spanos is an out-of-state lawyer was not the reason he was not admitted here. The reason was that he did not make application in accordance with the Southern District Rules. All he had to do was make his application which would probably have been granted. But we ought not to attempt to correct this omission years later by any nunc pro tunc blessing. The power of the district courts to require applications for admission and to regulate admissions is not unimportant. The opinion of the majority would seem to reduce to zero the power of any court in New York, state or federal, to exercise any control over who practices law in New York where the legal advice sought concerns a "federal claim or defense," a test which is broad enough to include almost anything in these days of ever-burgeoning federal jurisdiction. Surely it cannot be seriously questioned that courts ought to have the power to regulate who practices before them for their own protection and that of litigants. There is an orderly and well-defined way in which the courts handle these matters; Spanos here chose not to follow it.

If the bar is disturbed because the fee for advice on federal matters given away from a lawyer's home state may not be collectible, then the bar should urge the judges of the Southern District to change the present rule to permit general admission to all out-of-state attorneys. (Of course even this would not help those who, like Spanos, neglect to avail themselves of local rules of practice.) As presently written the rule permits such general admission only to New York, Connecticut and Vermont lawyers. See footnote 6 of my first opinion which points out that at least twenty federal district courts permit general admission to out-of-state lawyers. The Western and Northern Districts of New York have already provided for such general admission for out-of-state lawyers. Where there is any need for a more liberal admission policy there is no reason to doubt that the judges of any district court will give proper considera-

tion to adopting appropriate provisions in the rules of their court.

Apparently the majority would leave the more than 200,000 out-of-state lawyers from the forty nine other states free to practice federal law in New York without any regulation whatever—none from New York, and none from any federal court, until it was time to appear at trial. This decision would seem to mean that an attorney admitted to practice in any state has an unrestricted license to practice federal law and give advice on federal law in all other forty nine states. I doubt whether many states make much, if any inquiry, as to what, if anything, applicants to their bar may know about federal law. Thus out-of-state lawyers advising in whole or in part on federal law would seem well advised not to apply for state admission or for federal court admission and thus avoid all possibility of supervision or check.

APPENDIX C

Judgment of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the second day of August, one thousand nine hundred and sixty-six.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,
" STERRY R. WATERMAN,
" LEONARD P. MOORE,
" HENRY J. FRIENDLY,
" J. JOSEPH SMITH,
" IRVING R. KAUFMAN,
" PAUL R. HAYS,
" ROBERT P. ANDERSON,
" WILFRED FEINBERG,
Circuit Judges.

NICK C. SPANOS,
Plaintiff-Appellee,

v.

SKOURAS THEATRES CORPORATION, THEATRE & CINEMA, INC., PHILHAMBRO, INC., YOUNGSTOWN THEATRE CORPORATION and MODERN PLAYHOUSES, INC.,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to the appellee.

A. DANIEL FUSARO,
Clerk.

/s/ By VINCENT A. CARLIN,
Chief Deputy Clerk.

Office-Supreme Court, U.S.
FILED
NOV 25 1966
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 605

SKOURAS THEATRES CORPORATION, THEATRE & CINEMA, INC., PHILHAMBRO, INC., YOUNGSTOWN THEATRE CORPORATION and MODERN PLAYHOUSES, INC.,
Petitioners,

v.

NICK C. SPANOS, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S MEMORANDUM IN OPPOSITION TO PETITION FOR CERTIORARI

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NICK C. SPANOS, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

RESPONDENT'S MEMORANDUM IN OPPOSITION TO PETITION FOR CERTIORARI

The Petition for Certiorari raises no questions warranting this Court's attention. The decision below is not only eminently correct but is narrowly and carefully confined to the equitable considerations involved in the application of a local court rule to the facts of this particular case. The broader constitutional questions discussed below were concededly unnecessary to

the decision.[1] That discussion with reference to constitutional privileges and immunities was designed not to resolve the rights of the parties to this action but merely to give advice to the legal world in general, being expressly premised on "the importance of the problem and the desirability of furnishing guidance to the bar." Pet. App. 25a. These advisory comments of the Second Circuit cannot qualify as grounds for certiorari since this Court "cannot give decisions which are merely advisory." *Federal Radio Commission* v. *General Electric Co.*, 281 U.S. 464, 469.

I

The sole issue in this case is a most parochial one—can these petitioners avoid payment of reasonable *quantum meruit* compensation to this respondent for valuable legal services rendered under the circumstances here involved? The circumstances are these: The respondent Spanos rendered his legal services in California and New York at petitioners' express request both prior and subsequent to June of 1953 in connection with an 88 million dollar antitrust action petitioners filed at that time in the federal court for the Southern District of New York against practically all the major motion picture distributors in the United States [referred to herein as the "industry suit"]. The District Court found [235 F. Supp. at 16] that the petitioners had received substantial benefits from the industry suit and had arrived at settlements with

[1] Petitioners themselves refer to the decision below as one "unnecessarily deciding constitutional questions." Petition, p. 24. They also describe the Second Circuit's discussion of these questions as "an alternative ground for affirmance" of the District Court's judgment. Petition, p. 9.

some of the defendants therein prior to petitioners' discharge of Spanos without cause in October of 1958. But that industry suit still remains pending and, as of this date, untried as to the remaining defendants therein.

Spanos' *quantum meruit* claim has been resisted by his clients, the petitioners herein, on the novel premise that the lawyer of their own choosing, an eminent and highly qualified member of the California bar and of this Court's bar, was somehow engaged in the unauthorized practice of law in New York while working there by invitation of and in cooperation with petitioners' New York lawyers, who were representing and advising petitioners concerning their federal cause of action. In all three opinions below [those of the District Court, the Second Circuit panel and the Second Circuit sitting *in banc*] it was agreed that Spanos was repeatedly sought out by the petitioners as an expert in federal antitrust actions, that Spanos agreed to render his services to petitioners as an associate of the late Dean James M. Landis [who was one of petitioners' New York lawyers in the industry suit] and in addition as counsel to petitioners' attorney of the record in the industry suit—the New York law firm of Weisman, Cellar, Allan, Spett, & Sheinberg. It was further agreed that Spanos never appeared either in court or at depositions in connection with the industry suit except with local attorneys of record in that suit.

The alleged illegality of respondent Spanos' activities in this respect is said to spring primarily from his "having failed first to obtain admission . . . to practice before the [federal] District Court" on a *pro hac*

vice basis.[2] Petition, p. 3. Although petitioners nowhere make it clear, this "failure" which they seek by repetition to ascribe to Spanos is really their own. Only petitioners through their attorney of record in the industry suit ever had the legal status to have Spanos admitted *pro hac vice* in that suit. Rule 3(c) of the local rules for the Southern District of New York, which controls *pro hac vice* admissions, expressly provides that such admission is secured by "motion." Under federal procedure and practice [see Rules 7(b)(2) and 11 of the Federal Rules of Civil Procedure], motions in a particular federal case can only be made by the attorney of record in the case. *First Iowa Hydro Electric Co.* v. *Iowa-Illinois Gas & Electric Co.*, 245 F. 2d 613, 629 (C.A. 8). Thus the scene conjured up by petitioners' contention, the scene wherein Spanos presents himself alone to move his own admission in the industry suit without regard to the presence, desires or obligations of petitioners' attorneys of record, simply cannot be played in the District Court for the Southern District of New York.

On this point, the District Court specifically found (235 F. Supp. at 12) that petitioners' own "resident New York lawyers knew the facts and would seem to have had some obligation to call the relevant sections of the New York Penal Law to his [Spanos'] attention and to move the admission of Spanos *pro hac vice* if this were necessary to avoid a violation of law or unprofessional conduct on his part." And the *in banc* Court of Appeals, after noting that Spanos' employ-

[2] Petitioners also assert half-heartedly that Spanos also failed to obtain admission to the New York state bar. But the main controversy and the decisions below relate only to the absence of Spanos' *pro hac vice* admission to practice before the Southern District pursuant to Rule 3(c) of that Court.

ment contemplated court appearances on his part, held that when the petitioners "engaged him to that end, they impliedly assumed the obligation of having their New York lawyers in the action make any motion that was necessary to render such appearances lawful." Pet. App. 24a.

Moreover, the District Court below, the same District Court that would have passed upon any motion for Spanos' *pro hac vice* admission in the industry suit, found that "at any time on motion, the admission of Spanos *pro hac vice* would have been authorized by this Court." 235 F. Supp. at 11. This finding came after hearing days of testimony, during which petitioners dredged up whatever "evidence" they thought they had to support their contention that their own lawyer, Spanos, was not worthy of admission *pro hac vice* in the very court before which they had hired him to serve. And the District Court declared that the record thus made did not even reflect a suggestion of any basis for the denial of admission to Spanos. The *in banc* Second Circuit agreed with that finding. Pet. App. 24a. Indeed, the original Second Circuit panel majority and the *in banc* dissenters were implicitly in agreement as to Spanos' integrity. Many of the factual statements in the Petition are directed to what petitioners call improper activities of Spanos in matters other than the industry suit. But none of the findings below nor the record itself gives any support for such alleged improprieties.

Petitioners are thus left urging that as the result of their own failure to obtain Spanos' *pro hac vice* admission Spanos has violated a New York criminal statute respecting the illegal practice of law. They urge that contention even though Spanos did not hold

himself out as a New York lawyer, gave no advice concerning New York law and had no occasion to appear of record in the federal courtroom in pursuit of petitioners' federal claim. And having discharged Spanos before any contemplated court appearances on his part could occur, appearances wherein a *pro hac vice* admission would have been necessary and would most assuredly have been granted, petitioners can point only to their own failure to insist upon a most needless formality of a *pro hac vice* admission on some unidentified and unidentifiable occasion as the basis of Spanos' alleged illegal activities. From this welter of inconsistencies the petitioners would draw the impossible and inequitable conclusion that they are now free to disregard all their financial obligations to Spanos and to retain, without any cost to them, all the legal advice and benefits rendered them by Spanos over a five-year period.[3]

This conclusion was rightly rejected by the courts below after a thorough analysis of the facts and the governing principles of law. Petitioners here seek nothing more than a flat denial of the overriding general policy of the law, as Mr. Justice Holmes put it, "of preventing people from getting other people's property for nothing when they purport to be buying it." *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, 212 U.S. 227, 271 (dissenting opinion), quoted with approval in *Kelly* v. *Kosuga*, 358 U.S.

[3] Petitioners sought by counterclaim to recover back the compensation actually paid Spanos during the five years of his service, thus obtaining all of his services for nothing. The lower courts all rejected that counterclaim. See Pet. App. 20a. As it reaches this Court, the controversy concerns only the *quantum meruit* claim for additional compensation.

516, 520-521. And they would deny that fundamental policy by exploiting their own failure to fulfill what was in any event their own obligation. No reason exists why this Court should further dignify petitioners' effort "to obtain [Spanos'] expert legal assistance" without "paying the bill," Pet. App. 27a.

II

The relevant facts in this case reveal a situation that is a common everyday occurrence in federal practice, a situation so utterly devoid of impropriety as to render petitioners' claims frivolous. Actually, the facts are such that if petitioners' charges of illegal practice of the law were to be recognized a most dangerous precedent would be established, threatening the livelihood and reputation of countless legal experts who are called from outside their home states to advise and aid in the prosecution and defense of complex federal causes of action.

The respondent Spanos was employed by petitioners with full knowledge that he was not a member of the New York bar. He was employed precisely because of his expertise in the federal antitrust aspects of the motion picture industry. He was called from California to advise the petitioners and their New York attorneys concerning the multi-million dollar treble damage action that they desired to file against certain leaders in the nationwide motion picture distributing industry and certain theatre operating affiliates, an action charging violations of the antitrust laws throughout the United States. See 235 F. Supp. at 5. And his employment came, with petitioners' full authorization, at the express invitation of one of the prominent New York lawyers who were already repre-

senting the petitioners in this matter. The legal services for which Spanos here seeks compensation were at all times in aid of and in association with these lawyers, who were concededly members of the New York bar.

Spanos commenced work on this industry suit about six months prior to the filing of the complaint in the Southern District federal court.[4] He did so on a contingent basis, augmented by a minimum base pay. See 235 F. Supp. at 5-6. And he was required to agree not to accept any further or future employment which would in any way interfere with his work on the industry suit. So complete was Spanos' commitment to this matter that he was forced to reduce fees on matters he was already handling for other clients by $260,000. See 235 F. Supp. at 17.

Spanos performed his various services both in California and New York,[5] and the petitioners received and utilized the benefits of those services during the five years preceding their discharge of him in 1958. As the Court of Appeals noted, the contract engaging Spanos "can fairly be construed as contemplating court appearances on his part." Pet. App. 24a. In point of

[4] Obviously there was no basis whatever for seeking Spanos' admission to practice *pro hac vice* in the Southern District prior to the institution of the industry suit in that court. Yet petitioners would deny compensation to Spanos for that pre-litigation period because of the failure to have him admitted *pro hac vice!*

[5] From 1953 to 1955 Spanos discharged his obligations without moving his residence from California to New York and actually performed some of his research functions in California. In 1955 he temporarily moved from California to New York as a matter of convenience to his clients. But petitioners would withhold compensation for the work done in California, the theory apparently being that it was done in violation of the penal laws of New York!

fact, for reasons beyond Spanos' control since he was not the attorney of record, the progress of the industry suit was so slow and the dormant intervals became so extended that these contemplated court appearances never took place prior to the discharge. As a result, Spanos' principal contributions to the case were described by the District Court in these terms (235 F. Supp. at 11):

> "Whatever may have been his hope or belief at the outset, plaintiff [Spanos] acted primarily as a consultant to the New York lawyers. He did, of course, work directly with George Skouras and others in the Skouras companies but this did not so much involve abstract legal advice as it did a study of the facts, an analysis of correspondence and other records, and the rendering of assistance to George in preparing on the facts for his deposition. Spanos was not an attorney of record and never acted for defendants in court or during any pretrial procedures (except as a spectator). He drew no pleadings or other court papers. He helped members of the New York bar in connection with pleadings and other papers in the industry suit but did nothing on his own responsibility."

The original 1953 understanding between petitioners and Spanos, under which these various services were performed, continued unchanged until 1956. At that time certain of petitioners' New York counsel withdrew from the industry case. Petitioners thereupon entered into a written retainer agreement with the New York law firm of Weisman, Cellar, Allan, Spett, & Sheinberg, whereby that firm was to be the "sole and only attorneys working for [petitioners] in the [industry suit] and shall continue as [petitioners'] sole attorneys of record." 235 F. Supp. at 8. This written retainer further fixed upon petitioners the responsibility for arranging that the Weisman firm

would continue to have the "aid and cooperation of Nick Spanos." 235 F. Supp. at 8. This proviso, according to the testimony of both George Skouras and Weisman, was included at the express request of Weisman (A168, A227, 108a.) Weisman himself made clear (A220, A225) that "I was in charge of the matter, I fixed all policy, I had all the conferences . . . [Spanos] took orders from me such as I sought to give." Weisman at another point testified that his wish to have Spanos' help in the industry suit persisted until he learned of Spanos' discharge by petitioners (A227).

It is against the background of these facts that petitioners have asserted that, absent a *pro hac vice* admission to practice before the Southern District, Spanos was engaged in the illegal practice of law in New York. Yet clearly this is a situation that is very typical of that existing in most major federal court litigation—a gathering together of specialized lawyers dealing with those aspects of the case in which they are respectively skilled. Many of the lawyers in such groups are members of the bar of the state in which the litigation is brought; others are not. It is a picture repeated time and again in federal litigation involving such complex matters as antitrust claims, patents, copyrights, taxation and various forms of governmental regulations. Many of these cases, like the instant one, concern nationwide clients, nationwide problems and nationwide expertise. And when, in those cases, a large number of lawyers are employed from around the country it is neither customary nor appropriate for one of the local attorneys of record to move the *pro hac vice* admission of each of the out-of-state attorneys unless and until they are about to participate in the trial or otherwise address the court.

To assert that such an out-of-state attorney, who does no more than advise or do research on the federal

claim, is practicing law in violation of local criminal statutes in the absence of securing his *pro hac vice* admission in the federal court is to elevate the *pro hac vice* concept far beyond its purpose. Such an admission to practice is at most a "formal ritual of a particular court," *Schifrin* v. *Chenille Mfg. Co.*, 417 F. 2d 92, 94 (C.A. 2), and failure to comply with any rule respecting *pro hac vice* admission is generally deemed to be a "mere inadvertence" that affects no rights of the litigants, *United States* v. *Bradford*, 238 F. 2d 395, 397 (C.A. 2). See also *In re Miltones, Inc.*, 286 F. 806, 809 (C.A. 2). No one besides petitioners has ever suggested that *pro hac vice* admission, particularly before the occasion for such admission arises, is necessary in order to avoid the charge of illegal practice of law or in order to obtain the payment of fees by the lawyer's own clients. Petitioners' contentions would condemn as criminal the activities of most out-of-state lawyers involved in the massive activities necessary to major federal court litigation, and would further make criminal all activities of out-of-state lawyers concerning federal matters not yet in litigation. Those contentions find no support whatever in federal jurisprudence. And certiorari should not be granted merely to confirm the rejection which those contentions deserve and have received in the courts below.

III

The critical elements of the *in banc* decision below was a rejection of petitioners' claim that they could consider their contract with Spanos as unlawful and unenforceable when they had discharged Spanos before fulfilling their obligation to secure his admission when appropriate on a *pro hac vice* basis under Rule 3(c) of the Southern District's Rules. See Pet. App. 24a-25a. As the District Court had ruled, such an

admission would undoubtedly have been authorized had it been sought upon an appropriate occasion. And petitioners' action in discharging Spanos prior to the conclusion of the case, thereby foreclosing any opportunity that might have arisen to secure his admission, was held to preclude petitioners from taking advantage of any possible adverse inference to be drawn from the failure to secure his admission.

The decision below thus rests squarely on the equitable considerations implicitly involved in local Rule 3(c). In effect, the *in banc* court, as distinguished from the Second Circuit panel, ruled that petitioners' own actions and inactions could not prevent the protective federal umbrella of Rule 3(c) from extending over the entire period of Spanos' employment—particularly for purposes of securing what was rightfully owed him.

This narrow *in banc* ruling was acknowledged by the court to "suffice to dispose of the case." Pet. App. 25a. So viewing the ruling, no basis appears for invoking this Court's certiorari jurisdiction. The equitable considerations involved in the application of a local court rule, especially for the stated purposes, are matters traditionally left to the court and the Circuit involved. And the rule has here been interpreted and applied in a manner so consistent with the equities and realities involved as to create no conflict of decision and no issue of national significance justifying attention by this Court.

IV

Various other questions tendered by petitioners, some of them couched in constitutional terms, were either not decided below, not necessary to the decision rendered, or involve purely factual considerations. Such questions cannot qualify for review by this Court.

Thus petitioners' effort to obtain a ruling by this Court as to whether the respondent Spanos engaged in the unauthorized practice of law in violation of Sections 270 and 271 of the New York Penal Law involves a matter which the Second Circuit found unnecessary to decide. See Pet. App. 26a. It was enough to insulate a lawyer against any possible unauthorized practice charge, as petitioners have consistently recognized, if there was some form of compliance with the *pro hac vice* provisions of the Southern District's Rule 3(c), and the Second Circuit has ruled that in the administration of that rule the petitioners cannot take advantage of their own actions and inactions in preventing compliance. Hence it became unnecessary for the court "to endeavor to predict whether the New York Court of Appeals would consider Spanos' conduct" violative of the New York Penal Law. Pet. App. 26a.[6]

---

[6] In any event, Spanos' conduct was not violative of the New York Penal Law. The sole case relied on for the contrary conclusion is *Spivak* v. *Sachs*, 16 N.Y. 2d 163, 263 N.Y.S. 2d 953. But in that case an out-of-state lawyer injected himself into a New York matrimonial controversy and rendered advice in New York on matters of New York law; he was not acting at the invitation of or in cooperation with New York counsel. His application for fees, payable not by his client but by the adverse spouse, was denied on the ground that he was illegally practicing law in New York. The distinctions between *Spivak* and the instant case are obvious. The respondent Spanos was at the very least engaged solely in giving advice in matters of *federal* law, not New York law. New York courts have recognized the inapplicability of the *Spivak* ruling where the legal activities relate solely to federal matters. See *Faerber* v. *Kertess*, N.Y. Sup. Ct., Westchester Cty., reported in 155(90) New York Law Journal, p. 20, col. 2T, May, 9, 1966; also noted in Clark's Digest, Vol. 30, No. 5, p. 50 (May, 1966). In that case the action of an out-of-state attorney in conferring and advising with a client in New York concerning a Presidential pardon from a federal conviction was held not to constitute illegal practice of law under the New York Penal Law.

Moreover, the various comments of the Second Circuit concerning the constitutional privileges and immunities of citizens of the United States were not essential to or a necessary part of the decision below. The actual disposition of the case by the Second Circuit was in terms of the equitable considerations involved in the application of Rule 3(c). What was said with reference to constitutional considerations was in the nature of an advisory opinion, written solely because of "the importance of the problem and the desirability of furnishing guidance to the bar." Pet. App. 25a. Petitioners themselves recognize the advisory and unnecessary nature of this portion of the opinion below. See Petition, pp. 9, 24, as quoted in footnote 1 herein, *infra*. Such an advisory opinion cannot, of course, be reviewed by this Court. *Muskrat* v. *United States,* 219 U.S. 346; *Alabama* v. *Arizona,* 291 U.S. 286.

The final question suggested by petitioners, concerning the District Court's finding as to diverse citizenship in support of its jurisdiction in this case, presents no issue of a legal or important nature. Whether Spanos was or was not a New York resident is a purely factual matter, resolved as such by the District Court and affirmed on that basis by the Second Circuit panel. See Pet. App. 14a. And, in any event, jurisdiction is here sustainable on the alternative basis of the federal nature of Spanos' compensation claim, related as it is to his activities in a federal court case and the applicability of a federal court rule. See Pet. App. 16a-18a.

V

As already indicated, the contentions advanced here by the petitioners would directly inhibit and impinge upon the long established federal practice of calling

together a variety of legal experts from around the country to work upon complicated matters of federal litigation. Indeed, that very impingement would also constitute an intrusion upon the power of the federal courts to control the litigation before them and to determine who may and may not advise, work and appear in that litigation.

This Court has consistently recognized that federal courts are not compelled in all instances to subordinate themselves to the bar requirements and regulations of the various states. See *Theard* v. *United States*, 354 U.S. 278. Federal courts should be particularly free to establish their own concepts of the proper practice of law before them, and to determine the reasonable fees chargeable, when dealing with cases of a federal nature. See *Sperry* v. *Florida*, 373 U.S. 379, 385: "A State may not enforce licensing requirements which, though valid in the absence of federal regulation, give 'the State licensing board a virtual power of review over the federal determination' that a person or agency is qualified and entitled to perform certain functions . . ."

And so in this instance the Second Circuit has done no more than insist upon the power of federal courts to determine the propriety of the activities of those in some manner involved in cases pending before them. It has done so in a manner that gives due recognition to the right of qualified attorneys to move freely about the several states, conferring and advising on federal matters of a complex and interstate nature. See *Cooper* v. *Hutchinson*, 184 F. 2d 119, 122 (C.A. 3); *Cochran* v. *Burdick*, 70 F. 2d 754, 756 (App. D.C.); *Tuppela* v. *Mathison*, 291 F. 728, 730 (C.A. 9); and see 28 U.S.C. § 1404, dealing with the transfer of cases

from one federal court to another. The court has confirmed that right without hobbling it with unrealistic insistent upon compliance with meaningless rituals or irrelevant state laws.

The Second Circuit's action, moreover, reflects a sensible rejection of petitioners' concept that they fall within "a very strange class of private attorneys general," *Kelly* v. *Kosuga,* 358 U.S. 516, 520, able to invoke state criminal laws and have their own attorney found guilty of unauthorized practice of the law. If there is to be any sanction for unauthorized or illegal practices, it is the function of the appropriate state or federal authorities, rather than a private client-citizen, to invoke that sanction. For a client to avoid payment of a reasonable and just fee, under the guise of protesting what such authorities have not seen fit to protest, is to subvert both the attorney-client relationship and the supervisory power of courts over those engaged in the practice of law.

Thus the Pandora's box which petitioners would open more than justifies the determination reached by the Second Circuit and warrants the rejection of the Petition herein.

CONCLUSION

For these various reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

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No. 605

SKOURAS THEATRES CORPORATION, THEATRE & CINEMA, INC., PHILHAMBRO, INC., YOUNGSTOWN THEATRE CORPORATION AND MODERN PLAYHOUSES, INC.,

Petitioners,

v.

NICK C. SPANOS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY TO MEMORANDUM IN OPPOSITION TO PETITION FOR CERTIORARI

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Attorneys for Petitioners.

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IN THE

Supreme Court of the United States

October Term, 1966

No. 605

SKOURAS THEATRES CORPORATION, THEATRE & CINEMA, INC., PHILHAMBRO, INC., YOUNGSTOWN THEATRE CORPORATION AND MODERN PLAYHOUSES, INC.,

Petitioners,

v.

NICK C. SPANOS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY TO MEMORANDUM IN OPPOSITION TO PETITION FOR CERTIORARI

In his opposition to the petition for certiorari, the respondent, Spanos, simply ignores the two principal questions raised by the decision below—whether and to what extent federal law preempts regulation by New York as to the practice of law within that state and whether and to what extent the privilege and immunities clause of the Fourteenth Amendment restrains such regulation. These questions however, cannot be dismissed so lightly. They are exceedingly important and bear directly on the delicate balance between the powers of the states and the federal government in an area traditionally reserved to state regulation; and the manner in which the Court below has decided them is so plainly in error that review by this Court is urgently required.

1. Spanos insists that the decision below presents only the one narrow question: how shall the local General Rule 3(c) of the District Court for the Southern District of New York, providing for *pro hac vice* admission to that Court, be applied to the facts of this particular case? What he obscures, however, is that when the Court below, as it does here, so construes Rule 3(c) as to legitimize Spanos' practice of law in New York without regard to the law of that state, it implicitly holds that that local rule preempts the field and bars the application of the New York law to Spanos' activities, insulating him from all state regulation as to the unauthorized practice of law. The decision below therefore necessarily involves the question whether there has been such a federal preemption of this field and, if so, to what extent. We contend that on this issue the decision below is in error.

We do not, as Spanos unjustifiably suggests (Memo. Opp. 13), seek certiorari to obtain a ruling by this Court as to whether he violated the laws of New York. We consider that issue foreclosed, against Spanos, by the recent decision of the New York Court of Appeals in *Spivak* v. *Sachs,* 16 N. Y. 2d 163, 263 N. Y. S. 2d 953, which makes it plain that under New York law, Spanos would be denied the recovery granted to him by the Court below. As the Second Circuit panel noted, "[t]he broad sweep of New York decisions culminating in *Spivak* makes it clear that virtually no legal services may be rendered in New York by a person not admitted to the state bar except for 'customary and innocuous practices' in transactions only 'somehow' tied to New York. *Spivak* v. *Sachs, supra,* 16 N. Y. 2d at 168, 263 N. Y. S. 2d at 956" (Pet App. 15a). The *in banc* Court did not express a contrary view; concluding that the privileges and immunities clause of the Constitution precludes application of such state law to the activities of out-of-state lawyers when they collaborate with in-state

lawyers concerning federal claims or defenses, it found it unnecessary to consider whether Spanos' conduct was condemned by New York law [1] (Pet. App. 26a).

We must bear in mind that we do not here have the case of that "out-of-state attorney", hypothesized by Spanos, "who does no more than advise or do research on . . . [a] federal claim" in association with in-state lawyers (Memo. Opp. 10-11). As the Second Circuit panel remarked, ". . . Spanos was not merely consulting with his clients' local lawyers, a practice which indeed is common" (Pet. App. 15a). Rather, as the District Court found, "he worked directly with the Skouras companies [petitioners] and independently of Landis [the in-state attorney with whom he was supposedly associated]. Certainly he was not under any supervision of Landis and their association was in name only. Spanos put it in a letter in July 1953 that his hiring was to be 'full and equal' with Weisman, Sherpick and Landis [the in-state attorneys] . . . . [T]he 'association' between Landis and Spanos was only on paper; and from the beginning Spanos had been dealing directly with George [Skouras] and the Skouras companies." 235 F. Supp. at 7, 8.

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[1] Contrary to Spanos' suggestion (Memo. Opp. 13, n. 6), there are no significant distinctions between the *Spivak* case and the case here. Notwithstanding the lower state court ruling to which Spanos adverts, the New York Court of Appeals has made it clear that the practice of law prohibited by New York law includes legal services relating to federal matters. *Matter of New York County Lawyers Association* (*Bercu*), 273 App. Div. 524, 78 N. Y. S. 2d 209 (1st Dept. 1948), aff'd 299 N. Y. 728 (1949).

We certainly did not intend to be half-hearted in our argument as to Spanos' failure to obtain admission to the New York bar (see Memo. Opp. 4, n.2). In our view, that failure is fatal to his claim in this case, and, in light of his five-year practice of law in the state, *pro hac vice* admission to the District Court would not have aided him. Beyond this, as we note, he failed to seek or obtain such *pro hac vice* admission and therefore should not in any event be permitted to rely on Rule 3(c).

Moreover, Spanos' legal practice in New York was not restricted to the matters involved in the federal antitrust action, the so-called "industry suit". He also "rendered legal services in a number of matters for the Skouras companies or affiliates which were unconnected with the industry suit and for which he expected compensation . . . directly to the . . . clients", and independently of any other lawyers. 235 F. Supp. at 9.[2]

All this occurred neither during a short period of time nor only on occasional visits into New York, but rather over a period of five years, while Spanos occupied offices in New York, resided there with his family and frequently met and conferred with his clients there.

In such circumstances, as the Second Circuit panel stated, the "New York courts would refuse to grant recovery to Spanos if it were within their power to do so" (Pet. App. 16a). But the decision below holds that local Rule 3(c) of the District Court deprives them of that power and insulates Spanos from state regulation. In effect, then, the Court below holds that state laws prohibiting the unauthorized practice of law are displaced by federal law and rule, at least with respect to services rendered by out-of-state attorneys incident to federal litigation, notwithstanding the fact that such attorneys engage for many years in the state in the practice of law in violation of state laws.

It is doubtful that Congress has the power so to supplant state regulation of the practice of law, an area long considered reserved to the states. In any event, Congress has thus far manifested no intention to do so, with that clarity necessary to spell preemption. The construction which

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[2] In the light of these findings of the trial court (which Spanos has never disputed), we do not understand how he can now represent to this Court that he "gave no advice concerning New York law" and that the legal services for which he seeks recovery in this case "were at all times in aid of and in association with" petitioners' New York lawyers (Memo. Opp. 6, 8).

the Court below accords Rule 3(c) is therefore wholly unauthorized and invades a field of state concern in violation of the Constitution.

We have, it is true, argued further that local Rule 3(c) is in any event inapplicable because Spanos failed to invoke it. But Spanos misconceives our position when he says that we have "consistently recognized" that compliance with the rule is "enough to insulate a lawyer against any possible unauthorized practice charge" (Memo. Opp. 13). To the contrary, we have always contended that 28 U. S. C. 1654, the statute pursuant to which the rule was presumably promulgated, affords no authority for so radical a displacement of state regulation (Pet. 13) and that there is no suggestion elsewhere that Rule 3(c) was intended to effect such a displacement (Pet. 15-17).

Nor is there any support for the contention, repeatedly asserted by Spanos, that his failure to secure *pro hac vice* admission to the District Court was petitioners' fault, not his; that petitioners had an obligation to call the New York law to his attention and arrange his admission and failed to do so (Memo. Opp. 4-6). The record discloses that, in fact, one of petitioners' New York lawyers did direct his attention to the infirmity of his status because of his failure to secure admission to the District Court and that Spanos nonetheless did not ask for such admission (R. 110a-112a). There is not a scintilla of evidence that Spanos ever requested anyone to move his admission. It is incredible that he was not fully alert to the necessity for admission; just why he chose not to seek it has never been explained.

Spanos' concern that subjecting out-of-state attorneys to state regulation with respect to unauthorized practice of law would threaten "the livelihood and reputation of countless legal experts who are called from outside their home states to advise and aid in the prosecution and defense of complex federal causes of action" (Memo. Opp. 7) may well justify careful consideration by the Congress and

a cooperative effort by the federal and state authorities to accommodate the interests of assuring effective legal counsel on federal matters with the concededly important interests of the states in protecting their citizens from the abuse of unauthorized practice of the law. It was just such careful consideration of similar problems which led to the enactment by Congress of the legislation permitting laymen to practice before the Patent Office. *Sperry* v. *Florida,* 373 U. S. 379, 391-399 (1963). This is a matter, however, for Congressional action; it is no ground for the federal judiciary, before Congress has acted, to disregard state laws and rules relating to the practice of law.

Spanos' fears of "a most dangerous precedent" should petitioners' position be sustained (Memo. Opp. 7) are misplaced; the dangerous precedent arises rather from the decision below. For, as the Memorandum in Opposition shows, a logical extension of that decision inevitably creates a vast body of persons free to render legal services without regulation of any kind whatever. Since, as Spanos recognizes, *pro hac vice* admission would be irrelevant unless a suit were pending in a federal court (Memo. Opp. 8, n.4), he quite correctly reads the decision below to authorize one to perform legal services with respect to federal matters, absent such litigation, without qualifying either under state or federal laws or rules. As the dissenting judges below pointed out, this ". . . would leave the more than 200,000 out-of-state lawyers from the forty nine other states free to practice federal law in New York without any regulation whatever—none from New York, and none from any federal court, until it was time to appear at trial" (Pet. App. 32a). Indeed, the decision below would permit even one claiming legal expertise by virtue of certification only in a foreign country to perform legal services within any of the states so long as the services related to federal questions.

Such a condition would effectively frustrate the well-recognized interests of the states "to protect . . . [their]

citizens against the dangers of legal representation and advice given by persons not trained, examined and licensed for such work, whether they be laymen or lawyers from other jurisdictions'' *Spivak* v. *Sachs*, 16 N. Y. 2d 163, 168, 263 N. Y. S. 2d 953, 956 (1965). The ''general policy of preventing people from getting other people's property for nothing when they purport to be buying it'' (see Memo. Opp. 6) may, as a matter of federal law, justify denying a defendant the right to interpose a defense grounded in a federal statute; it does not, however, justify depriving a defendant of the right to assert a defense made available to him by state law and sanctioned by the state as a means of enforcing vital state policy. See *Kelly* v. *Kosuga*, 358 U. S. 516, 519 (1959).

2. Spanos cavalierly dismisses the second important question presented by the decision below—whether and, if so, to what extent the privileges and immunities clause of the Fourteenth Amendment restrains the states in their regulation of the practice of law—as the subject merely of ''an advisory opinion'' and thus not reviewable by this Court (Memo. Opp. 2, 14).

The opinions of the *in banc* Court, however, make it crystal clear that all the judges below considered the privileges and immunities clause as supplying an independent ground for the decision of affirmance. Although Judge Friendly's opinion, approves the District Court's holding that Spanos' ''right to recover could be predicated on Rule 3(c)'' (Pet. App. 24a) and notes that ''this would suffice to dispose of the case'' (*Id.* 25a), it proceeds to deal with the ''other *grounds* that have been urged for affirmance'' (*Id.* 25a, emphasis supplied). And at the very beginning of the discussion with respect to the privileges and immunities clause, the opinion describes its conclusion in that regard as a holding, stating (*Id.* 26a):

> ''. . . [W]e hold that under the privileges and immunities clause of the Constitution no state can

> prohibit a citizen with a federal claim or defense from engaging an out-of-state lawyer to collaborate with an in-state lawyer and give legal advice concerning it within the state."

At the end of that portion of the opinion, it once more describes the discussion as a holding (*Id.* 29a):

> ". . . We thus limit our holding to the situation here presented. . . ."

Judge Hays, concurring in the result, deemed it necessary to write a separate opinion to express disagreement with the limited holding as to the scope of the privileges and immunities clause (Pet. App. 30a).

And the dissenting opinion of Chief Judge Lumbard (with whom Judge Smith concurred) likewise makes clear that the privileges and immunities clause is one of the grounds of the *in banc* Court's decision, stating, as follows (Pet. App. 30a):

> "Judge Friendly's opinion now supports recovery on the theory that no state can prohibit a citizen with a federal claim from engaging an out-of-state lawyer to collaborate with an in-state lawyer because of the privileges and immunities clause of the Constitution. . . ."

In these circumstances, there is no justification whatever for dismissing this portion of the Court's opinion as merely advisory. Certainly, there is nothing abstract or hypothetical about our case, such as there was in *Muskrat* v. *United States,* 219 U. S. 346 (1911), *Alabama* v. *Arizona,* 291 U. S. 286 (1934), and the other cases where this Court has refused to review or render advisory opinions. Here, without question, we have a justiciable case and controversy, an actual dispute between real and adverse litigants.

Moreover, it is, of course, well established that "where a decision rests on two or more grounds, none can be rele-

gated to the category of *obiter dictum*". (*Woods* v. *Interstate Realty Co.*, 337 U. S. 535, 537 (1949)); ". . . where there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, 'the ruling on neither is *obiter*, but each is the judgment of the court and of equal validity with the other' . . ." (*United States* v. *Title Ins. Co.*, 265 U. S. 472, 486 (1924). Accord, *Massachusetts* v. *United States*, 333 U. S. 611, 622-623 (1948).

The decision below with respect to the impact of the privileges and immunities clause on the New York law as to unauthorized practice thus raises a question clearly reviewable by this Court. Review is warranted and reversal is required because the decision represents a wholly unjustified radical extension of the reach of the clause and enlargement of the powers of the federal courts at the expense of the states.

Respectfully submitted,

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Dated: December 1, 1966.